SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No.

ELWOOD HAMILTON, COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF KENTUCKY, Appellant,

versus

KENTUCKY DISTILLERIES & WAREHOUSE COMPANY, Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

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TRANSCRIPT OF RECORD.

PROCEEDINGS of the District Court of the United States for the Western District of Kentucky, at a regular term begun and held at the Federal Court Hall in the City of Louisville, on Monday, October 13, 1919.

PRESENT: HON. WALTER EVANS, District Judge.

BE IT REMEMBERED that heretofore, to-wit: on October 10, 1919, came the plaintiff herein, by Levy Mayer, Esq., and Wm. Marshall Bullitt, Esq., Counsel, and filed in the Clerk's office of said Court, its Petition in Equity in the above entitled cause, which Petition in Equity is in words and figures, as follows, to-wit:

KENTUCKY DISTILLERIES AND WAREHOUSE COMPANY, - - - - *Plaintiff,*

vs. **Petition in Equity.**

ELWOOD HAMILTON, Collector of Internal Revenue for the Fifth Collection District of Kentucky, *Defendant.*

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY, AT LOUISVILLE.

The plaintiff, the KENTUCKY DISTILLERIES AND WAREHOUSE COMPANY, states as follows, to wit:

(1) That the KENTUCKY DISTILLERIES & WAREHOUSE COMPANY is a corporation created on and organized and existing since February

3rd, 1899, under the laws of the State of New Jersey and is a citizen of that state, and has its principal office and residence at Jersey City, New Jersey; that it has $32,000,000 paid up and issued capital stock and since February 3rd, 1899, has under its charter (except as it has been interfered with by certain pretended laws of the United States) been engaged in the business of distilling, manufacturing, storing, distributing, buying and selling whiskey, alcohol, high wines and other distilled spirits for beverage purposes, and owning, operating and maintaining a large number of registered distilleries, bonded warehouses, bottling plants and other properties in Kentucky and elsewhere necessary for the conduct of its business; that the defendant, Elwood Hamilton is a citizen of the State of Kentucky and a resident of Louisville in said state, and is the United States Collector of Internal Revenue for the Fifth Collection District of Kentucky.

(2) That this is a suit of a civil nature in equity between citizens of different states, and arises under the Constitution and laws of the United States, and particularly under the FIFTH AMENDMENT to the Constitution, the Internal Revenue Laws of the United States and an Act of Congress approved November 21, 1918, entitled *"An act to enable the Secre-*

tary of Agriculture to carry out during the fiscal year ending June 30th, 1919, the purposes of the Act entitled 'An Act to provide further for the National security and defense by stimulating agriculture and facilitating the distribution of agricultural products', and for other purposes," and which Act is hereinafter called "War Prohibition Act", and this is a suit to compel the defendant to permit the plaintiff to pay the taxes on and withdraw certain whiskey from bond for sale in the United States for beverage purposes.

(3) That on November 21, 1918, there was enacted by Congress and approved by the President of the United States the said War Prohibition Act; that said Act contains the following provision:

> "That after June 30, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the manpower of the nation and to increase efficiency in the production of arms, munitions, ships, food and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export."

That under the provisions of said Act the Commissioner of Internal Revenue and all Collectors of Internal Revenue acting under his authority and direction, including the defendant, have on and since July 1, 1919, refused to permit the withdrawal of any distilled spirits from bonded warehouses for beverage purposes in the United States and are now refusing and will continue to refuse to permit such withdrawal except for export, unless otherwise directed by lawful authority.

That the aforesaid provision of the said War Prohibition Act is illegal, void and unconstitutional in that it operates (as hereinafter set forth) to take plaintiff's private property for public use without just compensation; that the FIFTH AMENDMENT to the Constitution of the United States provides that:

> * * * "Nor shall private property be taken for public use without just compensation."

That the plaintiff's property has been and is now being taken under the terms of said War Prohibition Act for public use, within the meaning of said FIFTH AMENDMENT, without just compensation or any compensation whatsoever being made therefor to the plaintiff; nor does said Act contain any machinery

or provision for ascertaining or awarding any compensation to plaintiff for its said private property which is so being taken under the terms of said Act.

(4) That the plaintiff is now, and for more than to wit, four years last past has been the owner, either in its own name or in that of Julius Kessler & Company, (a subsidiary branch of plaintiff), a corporation organized under the laws of West Virginia, whose entire capital stock is owned by the plaintiff, of at least 22,157 barrels of whiskey, containing according to the original official gauge, 1,091,253 proof gallons; that of said 22,157 barrels, 8,485 barrels contain 412,016.58 proof gallons according to the original official gauge, and were manufactured by the plaintiff more than to wit, four years ago, and were then and always have been and are now owned and were originally entered into by and now are in U. S. bonded warehouses in the name of the plaintiff; that the balance of said 22,157 barrels of whiskey, or 13,672 barrels, contain 665,240.77 proof gallons, according to the original official gauge and were manufactured by said Julius Kessler & Company more than to wit, four years ago, and were then and always have been and are now owned and were originally entered into by and now are in U. S. bonded

warehouses in the name of said Julius Kessler & Company; that the actual value and cost to the plaintiff of said 8,485 barrels of whiskey was on November 21, 1918, and for a long time prior to said date had been in excess of $400,000 and the actual value and cost to said Julius Kessler & Company of said 13,672 barrels of whiskey was on November 21, 1918, and for a long time prior to said date had been in excess of $600,000; that the actual value of all said whiskey (if the wrongs herein complained had not been committed) would be much in excess of $1,500,000, that 17,938 of said 22,157 barrels of whiskey now are and since a date more than to wit, three years prior to November 21, 1918, have been in U. S. bonded warehouses in the State of Kentucky, and the balance of said 22,157 barrels, viz., 4,219, now are and during all of said time have been in U. S. bonded warehouses in the City of Peoria and State of Illinois.

(5) That plaintiff, either in its own name or in that of its subsidiary branches, now owns and continuously since a date more than to wit, three years prior to November 21, 1918, has owned at least 15,964 proof gallons of whiskey in addition to said 22,157 barrels and which 15,964 proof gallons are known as floor stock, and are now on the premises of the

plaintiff and its said branches; that upon said floor stock the U. S. Internal Revenue tax of $6.40 per proof gallon has been heretofore duly paid to the United States by the plaintiff or its said branches; that from 1894 to October 3, 1917, the Internal Revenue tax was $1.10 per proof gallon; that on October 3, 1917, said tax was raised to $3.20 per proof gallon, and on February 24, 1919, said tax was again increased and raised to $6.40 per proof gallon, which is now the statutory tax rate; that on or about September 24, 1919, the plaintiff and its branches were compelled by the United States to and did pay to it $993,630.12 Internal Revenue tax under said law of February 24, 1919; that in said sum there was and is included $51,084.80, being the said increase in Internal Revenue tax paid by plaintiff or its said branches on said 15,964 proof gallons of said floor stock, upon which the said theretofore current tax of either $1.10 or $3.20 per proof gallon had already been paid by plaintiff or its said branches to the United States.

(6) That part and parcel of the said whiskey of the plaintiff so as aforesaid in bond in the State of Kentucky, are 534 barrels of whiskey, 139 barrels of which are branded Elk Run and 395 barrels are branded Mellwood, all of which was manufactured by the plain-

tiff; that of said 139 barrels of whiskey, 14 were on January 14, 1914, and 125 were on March 14, 1914, deposited by plaintiff in the U. S. Bonded Warehouse of Distillery registered No. 368, located in Louisville, Kentucky, in the Fifth Revenue District thereof; that said 139 barrels of whiskey contain, according to the original official gauge, 6,785.44 proof gallons; that of said 395 barrels of Mellwood whiskey, 145 were, in April, 1915, and the other 250 barrels thereof were in May, 1915, deposited by the plaintiff in the U. S. Bonded Warehouse of Distillery Registered No. 34, located in the said City of Louisville in said Fifth District; that said 395 barrels contain, according to the original official gauge, 18,877.47 proof gallons; that said respective portions of said 534 barrels of whiskey are now in said bonded warehouses, respectively; that the actual value and cost of said 534 barrels of whiskey including the tax so as aforesaid paid thereon, was and is in excess of $70,000; and that the present actual value of said 534 barrels of whiskey (if the wrongs herein complained of had not been committed), would greatly exceed said sum.

(7) That there are now in the U. S. Bonded Warehouses owned by the plaintiff 215,846 barrels of whiskey, of which there are (*a*) in

its Bonded Warehouses located in Kentucky, 207,158 barrels of whiskey, containing, to wit, over 10,000,000 proof gallons, according to the original official gauge and (*b*) in the Bonded Warehouses of the plaintiff located in Peoria, Illinois, 8,688 barrels of whiskey, containing, to wit, over 400,000 proof gallons, according to the original official gauge; that the actual cost and value of said whiskey was and is far in excess of $5,000,000; that of said whiskey all but said 22,157 barrels belongs to thousands of individuals, firms, banks and corporations, all or nearly all of whom are residents and citizens of the United States; that the owners thereof purchased the same in various quantities at different times during each of the seven years prior to November 21, 1918, and hold the plaintiff's warehouse receipts which were issued by the plaintiff for and represent said whiskey; that said warehouse receipts are negotiable instruments, and are dealt in and handled as such and pass by endorsement and delivery and that the names of said thousands of owners and holders thereof are unknown to and cannot be ascertained by the plaintiff.

(8) That the plaintiff is and for twenty years last past has been the owner of said warehouses, but the same are by law bonded to the United States and such of said ware-

houses as are in Kentucky are in the possession of and under the direction and control of the defendant and such as are in Illinois are in the possession of and under the direction and control of the Collector of Internal Revenue in said state; that under and pursuant to the law governing such matters the plaintiff, when said whiskey was entered by it, as aforesaid, into bond, was required to and did execute to the United States and did deliver to the respective Collectors of Internal Revenue, in and for the said respective collection districts, its monthly warehousing bonds to protect and insure the payment of the Internal Revenue tax upon said whiskey when the same should be withdrawn from bond; that the total bonded liability of the plaintiff, according to said bonds, is in excess of $10,000,000 and that said bonds are still outstanding and uncancelled.

(9) That the United States declared "That a state of war exists between the Imperial German Government and the Government and the people of the United States" on April 6, 1917; that said war continued with actual combat until November 11, 1918, when an Armistice was officially declared and established; that the United States, through its various departments, on and after the date of said Ar-

mistice, suspended its wartime activities in the production of arms, munitions, ships, food and clothing for the Army and Navy, and since said Armistice has, to a very large extent, disposed of a vast quantity of materials which it had theretofore accumulated for the further prosecution of the war, and it still has a large surplus of such materials which it is now actually engaged in selling to the public; that on July 14, 1919, the War Trade Board Section of the Department of State officially announced the resumption of trade with Germany, and that the Federal Reserve Board simultaneously officially announced the resumption of exchange with Germany; that on July 14, 1919, said War Trade Board Section officially announced that all commodities had been removed from the export conservation list; that there are now no restrictions upon trade between the United States and those countries with which it and the Allied Governments had been at war; that all censorship of postal, telegraphic and wireless communication between the United States and those countries was removed on June 21, 1919, and plaintiff states upon information and belief that demobilization of the armed forces of the United States has been actually terminated; that on November 11, 1918, the President of the United States, in addressing a joint meeting

of the two houses of Congress, after summarizing the terms of said Armistice, said:

> "The war thus comes to an end; for having accepted these terms of armistice, it will be impossible for the German Nation to renew it. * * *
>
> "It is not now possible to assess the consequences of this consummation. We know only that this tragical war whose consuming volume swept from one nation to another until all the world was on fire is at an end";

That the War Department officially declared in a published statement on September 30, 1919, that "in general, the accident of war and the progress of demobilization are at an end"; that the army that served in said war has been so reduced in numbers since said Armistice that over, to wit, 119,000 new recruits have been added to the Army for peace purposes; that according to the best information and belief of plaintiff no activities are being engaged in by the War Department with a view to any further conduct of the process of demobilization which was commenced immediately after the said Armistice, and which has now been conducted to a conclusion, as aforesaid; that the Navy of the United States has been reduced to less than 135,000 men and is smaller in strength than its authorized peace quota; that both the Army and the Navy of the

United States are now engaged in campaigns of enlistment to bring the numerical strength of the two branches up to their authorized peace-time footing; that there is now between the citizens of the United States and the citizens of those countries with which the United States has been at war, a free interchange of communication, business and trade, and money and commodities are being transported from the United States to those countries and from those countries to the United States; that communication by mail, cable and wireless, trade and commerce in money and commodities and general commercial intercourse has been resumed and is now being carried on between the citizens of the United States and the citizens of those countries; and that the production by the United States of arms, munitions, ships, food and clothing for the Army and Navy in connection with said war has completely ceased.

(10) That plaintiff is advised by counsel and respectfully states that the War Prohibition Act has terminated and ceased to be of legal effect; that the President, as plaintiff is informed and believes, and therefore states, has not determined and proclaimed the date of the termination of demobilization for that he has been advised by the Honorable Attorney

General of the United States that such War Prohibition Act, as matter of law, must remain in effect until the ratification of the Treaty of Peace and the exchange of ratifications thereof, and that, even though demobilization had been terminated, the President is not called upon to and should not determine and proclaim the same until the Treaty of Peace has been ratified and the ratifications exchanged, and plaintiff upon information and belief states that because of said advice the President has refrained from making said determination and proclamation and intends to continue to refrain therefrom; that the plaintiff is advised by its counsel and therefore respectfully states that plaintiff is now entitled, without let or hindrance by the defendant, to withdraw its said distilled spirits from bond for sale for beverage purposes in the United States upon plaintiff paying the requisite lawful tax thereon.

(11) That on July 10, 1919, the President of the United States submitted to the Senate the Treaty of Peace with Germany that he had theretofore in cooperation with the representatives of the Allied nations negotiated at Paris, France; that part of said Treaty is the Covenant of the League of Nations; that since said date said Treaty and Covenant have been

under consideration and debate in the Senate; that the Committee on Foreign Relations of the Senate (to which committee said Treaty and Covenant were, on July 10, 1919, referred) has heretofore on September 10, 1919, made a majority report to the Senate recommending the adoption of four reservations to be made a part of the ratification of said Treaty and Covenant; that a large number of amendments and other reservations to said Treaty and Covenant have been introduced in the Senate; that a minority of said Committee, on September 11, 1919, filed a minority report recommending the ratification of said Treaty and Covenant without any amendment, change or reservation whatsoever; that the President has publicly announced that he was determined that said Treaty of Peace with Germany and the Covenant of the League of Nations should be ratified by the Senate without amendment, reservation or change of any kind; that at the time of the filing of this bill of complaint it is impossible to state to what extent, if at all, said Treaty and Covenant will be ratified, and to what extent, if at all, said reservations and amendments will be adopted; that the proposed Treaty of Peace between the United States and Austria-Hungary has not as yet been submitted by the President to the Senate; that to what extent, if at all, said

treaty with Austria-Hungary will be accepted, ratified, changed or amended by the Senate, it is impossible at this time to state; that the plaintiff is informed and believes and therefore states that at least three if not more months will elapse before official ratifications of said Treaty of Peace with Germany and Covenant of the League of Nations and said Treaty of Peace with Austria-Hungary will be exchanged; that plaintiff is informed and believes and states that the time between the date of filing this petition and the date when the Prohibition Amendment hereinafter referred to becomes effective, will have passed before the ratifications are exchanged (if they be ever exchanged) of said proposed Treaties and Covenant of the League of Nations; that the effect of such delay will be to still further impair, if not entirely destroy the property of the plaintiff in its said whiskey; that there are now in U. S. Bonded Warehouses to wit, 69,000,000 proof gallons of distilled spirits according to the original official gauge, all of which were entered into bond long prior to November 21, 1918, and all of which are affected similarly to that of plaintiff, and the actual value of which exceeds, to wit, $75,000,000.

(12) That on December 3, 1917 (eight months after the aforesaid declaration of the existence of said war), Congress adopted and submitted to the legislatures of the several States a joint resolution proposing the adoption of said Amendment to the Constitution of the United States known as the Prohibition Amendment; that said Amendment prohibits the manufacture, sale or transportation within, or the importation into, or the exportation from the United States and all territory subject to its jurisdiction of intoxicating liquors for beverage purposes, one year after the date of its ratification by the States.

That on January 29, 1919, HON. FRANK L. POLK, Acting Secretary of State, issued the following proclamation:

"KNOW YE, That the Congress of the United States, at the second session Sixty-fifth Congress begun at Washington on the third day of December in the year one thousand nine hundred and seventeen, passed a resolution in the words and figures following to wit:

'*Joint resolution*, proposing an amendment to the Constitution of the United States:

'Resolved, By the Senate and House of Representatives of the United States of America in Congress Assembled (two-thirds of each House concurring therein), That the following amendment to the Constitution be, and hereby is, proposed to the States, to be-

come valid as a part of the Constitution when ratified by the legislatures of the several States as provided by the Constitution.

ARTICLE.

'Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

'Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

'Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.'

"And further, That it appears from official documents on file in this Department that the Amendment to the Constitution of the United States proposed as aforesaid has been ratified by the Legislatures of the States of Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, South Carolina, Texas, Utah, Virginia,

Washington, West Virginia, Wisconsin and Wyoming.

"And further, That the States whose Legislatures have so ratified the said proposed Amendment constitute three-fourths of the whole number of States in the United States:

"Now, THEREFORE, BE IT KNOWN THAT I, Frank L. Polk, Acting Secretary of State of the United States, by virtue and in pursuance of Section 205 of the Revised Statutes of the United States, do hereby certify that the Amendment aforesaid has become valid to all intents and purposes as a part of the Constitution of the United States.

"In testimony whereof, I have hereunto set my hand and caused the seal of the Department of State to be affixed.

"Done at the City of Washington this 29th day of January in the year of our Lord one thousand nine hundred and nineteen.

(Signed) "FRANK L. POLK,

(Seal) *Acting Secretary of State.*"

That said Prohibition Amendment expressly permits the manufacture, sale, transportation, importation and exportation of intoxicating liquors during a period of one year from the ratification of said Amendment; that according to said proclamation of the acting Secretary of State said one year elapses in January, 1920; that the debates of Congress and the history of the passage of said Joint Resolution by Congress show that said period

of a year was a condition to the passage and a material part of said Amendment; that said War Prohibition Act was as aforesaid passed on November 21, 1918, and by its terms prohibits the withdrawal from bond and the sale of distilled spirits for beverage purposes after June 30, 1919, thus allowing a period of only 8 months and 9 days for such withdrawal and sale and therefore is in conflict with said one year provision of said Amendment.

That under said continued enforcement of the War Prohibition Act, even though it should be ultimately suspended in its operation by proclamation by the President of the United States, shortly before January, 1920, plaintiff would be unable thereafter and before the taking effect of said Prohibition Amendment, to remove from bond and sell its said distilled spirits in the United States for beverage purposes; that said War Prohibition Act as now enforced by the defendant, constitutes an irremediable taking of plaintiff's property without just compensation.

(15) That the plaintiff has duly caused the contents of said 534 barrels of whiskey to be officially regauged by the defendant on October 9, 1919, for tax-payment; that the plaintiff on October 10, 1919, and before the filing of this petition, made to the defendant proper,

due legal tender of $132,331.52, which is the total lawful tax money due the United States on said 534 barrels of whiskey, and asked leave to withdraw from bond in order that the plaintiff might sell the same in the United States for beverage purposes (1) the said 534 barrels of whiskey above described, consisting of 139 barrels branded "Elkrun" and heretofore deposited and now on deposit as aforesaid in said United States Bonded Warehouse of Distillery registered No. 368, located in Louisville, Kentucky, and (2) the said 395 barrels of whiskey branded "Mellwood" heretofore deposited and now on deposit as aforesaid in said United States Bonded Warehouse of Distillery registered No. 34 located in said City of Louisville; but the defendant has refused, and declared that he will continue to refuse, to accept said tax money and to permit the withdrawal by plaintiff of said whiskey from bond for purposes of sale in the United States for beverage purposes, and plaintiff states that the defendant will continue such refusal unless ordered to permit such withdrawal of said 534 barrels of whiskey by the plaintiff from bond and such sale by it in the United States for beverage purposes by the process of this Honorable Court.

WHEREFORE, the plaintiff prays that the Court by its decree:

FIRST: Declare unconstitutional, illegal and void so much of said War Prohibition Act as provides as follows:

> "That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man-power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export."

SECOND: Restrain the defendant and all others acting under his authority or in association with him, from interfering with the usual process in the withdrawal, distribution, disposition and sale for beverage purposes in the United States of plaintiff's said 534 barrels of distilled spirits now in bond as aforesaid.

THIRD: Restrain the defendant from refusing to receive the application of this plaintiff for the withdrawal of any or all of said 534 barrels of whiskey from the said bonded

warehouses under his control and direct the defendant to accept from the plaintiff the said tax money so as aforesaid tendered by the plaintiff for such whiskey and to do all and sundry things necessary to be done by him, his officers and agents, to release said distilled spirits to the plaintiff for sale by it in the United States for beverage purposes.

FOURTH: Declare that the said War Prohibition Act has ceased to operate in so far as it affects or denies or restricts or interferes with the removal by the plaintiff from bond and sale by it in the United States for beverage purposes of said 534 barrels of whiskey or any other part of said 22,157 barrels of whiskey, and also in so far as it denies or restricts or interferes with the sale by the plaintiff in the United States for beverage purposes of said 15,964 proof gallons of floor stock whiskey.

FIFTH: Grant a temporary injunction or other appropriate relief as above prayed to the end that plaintiff may be immediately restored to the use and benefit and the right of withdrawal from bond and sale in the United States for beverage purposes of its said 534 barrels of whiskey pending the final hearing of this cause.

SIXTH: Grant such other and further relief as may be meet and proper in the premises.

MAY IT PLEASE YOUR HONORS, to grant unto the plaintiff a writ of subpoena, to be directed to the said Elwood Hamilton, Collector of Internal Revenue for the Fifth Collection District of Kentucky, the defendant hereinbefore named, commanding and requiring him to appear herein and answer, but not under oath, answer under oath being hereby expressly waived, the several allegations in this bill contained.

LEVY MAYER,
WILLIAM MARSHALL BULLITT,
Counsel for plaintiff.

STATE OF KENTUCKY, }
COUNTY OF JEFFERSON, } *ss.*:

Daniel K. Weiskopf, being first duly sworn, on oath deposes and says, that he is the president of the Kentucky Distilleries & Warehouse Company, the plaintiff herein, that he is authorized to verify the foregoing bill; that he has read the said petition and knows the contents thereof and that the same are true, except as to the statements in said petition stated to be made on information and belief, and as to those, he believes them to be true.

DANIEL K. WEISKOPF.

Subscribed and sworn to before me this 10th day of October, 1919.

M. L. WEIST,
Notary Public in and for Jefferson County, Kentucky.

At a Court held October 10, 1919:

This day came the plaintiff, Kentucky Distilleries & Warehouse Company, by Levy Mayer and Wm. Marshall Bullitt, Attorneys, and notice of a motion for the issuance of a preliminary writ of injunction having been served, filed and noticed of this date, moved herein for a preliminary injunction to the prayer of the petition in equity herein, and the Court being advised, it is ordered,

1. That the said motion for a preliminary injunction be filed.

2. That the hearing of said motion be and the same hereby is set for October 27, 1919, at 10 o'clock A. M.

3. That the defendant has leave to file answering affidavits, copies of which shall, on or before October 22, 1919, be served upon Wm. Marshall Bullitt, one of plaintiff's counsel, by leaving copies thereof with some one at his office, 1200 Lincoln Bank Building, Louisville, Ky.

4. The plaintiff shall have until October 27, 1919, to serve rebuttal affidavits by delivering copies thereof to W. V. Gregory, Esquire, United States District Attorney.

KENTUCKY DISTILLERIES AND WAREHOUSE CO., - - - - - - - *Plaintiff,*

vs. **Decree.**

ELWOOD HAMILTON, COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF KENTUCKY, - *Defendant.*

At a Court held on October 27, 1919:

This cause coming on to be heard upon the plaintiff's motion for a temporary injunction, the defendant thereupon moved to dismiss the Bill for want of equity on its face, the cause having been argued, and the Court being advised, it is ordered that the motion to dismiss be and the same hereby is overruled.

Thereupon, the defendant declined to plead further, and the plaintiff moved for a permanent injunction in accordance with the prayer of the Petition in Equity, and the cause having been argued and submitted upon final hearing upon the Petition in Equity, and the Court being advised,

IT IS ORDERED AND ADJUDGED AND DECREED as follows, to-wit:

That the defendant, Elwood Hamilton, Collector of Internal Revenue for the Collection District of Kentucky, be and hereby he is enjoined from refusing,

(*a*) To receive the application of the Kentucky Distilleries and Warehouse Company

for the withdrawal of 534 barrels of whiskey from United States Bonded Distillery Warehouses #368 and #34 in Louisville, Kentucky, and,

(*b*) To accept from the Kentucky Distilleries and Warehouse Company the lawful tax money due by the Kentucky Distilleries and Warehouse Company upon the withdrawal from bond of said 534 barrels of whisky, and,

(*c*) To release said 534 barrels of whiskey to the Kentucky Distilleries and Warehouse Company upon payment by it of said lawful tax.

The defendant presented its petition and assignment of errors, praying for an appeal from the foregoing decree to the Supreme Court of the United States, which appeal is granted, and it is ordered that same operate as a supersedeas.

WALTER EVANS,
District Judge.

The motion to dismiss, the petition for appeal and the assignments of errors referred to are as follows, to-wit:

KENTUCKY DISTILLERIES AND WAREHOUSE COMPANY, - - - - - *Plaintiff,*

vs. **Motion to Dismiss.**

ELWOOD HAMILTON, ETC., - - *Defendant.*

The defendant, Elwood Hamilton, Collector, moves to dismiss the bill for want of equity on its face.

W. V. GREGORY,
United States District Attorney.

KENTUCKY DISTILLERIES AND WAREHOUSE CO., - - - - - - - *Plaintiff,*

vs. **Petition for Appeal.**

ELWOOD HAMILTON, COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF KENTUCKY, - *Defendant.*

To the Honorable Judge of the District Court for the Western District of Kentucky.

The defendant, Elwood Hamilton, Collector of Internal Revenue, respectfully represents to the Court that he is aggrieved by the decree entered in this case on the 27th day of October, 1919, for the reasons set forth in the assignment of errors hereto attached.

WHEREFORE, he prays for an appeal to the Supreme Court of the United States, to the

end that said decree may be reviewed and, if found erroneous, reversed.

Respectfully,

W. V. GREGORY,

United States Attorney.

KENTUCKY DISTILLERIES AND WAREHOUSE CO., - - - - - - - *Plaintiff,*

vs. **Assignment of Errors.**

ELWOOD HAMILTON, COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF KENTUCKY, - *Defendant.*

The defendant, Elwood Hamilton, Collector, says that in the record and proceedings had in the above entitled cause, there is manifest error in the following particulars, towit:

1. The Court erred in overruling defendant's motion to dismiss, because his refusal to accept the taxes tendered, and to permit the removal of the whisky in question, was in obedience to the Act of Congress of November 21, 1918, which is a valid and constitutional Act, and is still effective.

2. The Court erred in granting the injunction prayed for, for the same reason that he erred in overruling the motion to dismiss.

W. V. GREGORY,

United States Attorney.

On October 27, 1919, the following stipulation was filed by the parties:

KENTUCKY DISTILLERIES AND WAREHOUSE CO., - - - - - - - *Plaintiff,*

vs. **Stipulation.**

ELWOOD HAMILTON, COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF KENTUCKY, - *Defendant.*

It is stipulated between plaintiff and defendant that on any appeal to the Supreme Court of the United States from the final decree herein, the record shall consist of the following papers as constituting the entire record in the case, and the Clerk is authorized so to certify:

Petition in Equity.
Order October 10, 1919.
Motion to Dismiss Petition in Equity, filed October 27, 1919.
Final decree entered October 27, 1919.
Petition for appeal.
Assignment of errors.
This stipulation.

That the issuance and service of a citation are waived.

LEVY MAYER,
WM. MARSHALL BULLITT,
Attorneys for Plaintiff.
W. V. GREGORY, *United States Attorney,*
Attorney for Defendant.

DISTRICT OF KENTUCKY, *ss.*

I, A. G. RONALD, Clerk of the District Court of the United States for the Western District of Kentucky at Louisville, do hereby certify that the foregoing 30 pages contain a true and correct transcript of all the portions of the record to be copied in the case mentioned in the caption hereof, in accordance with the stipulation of counsel on file and copied therein, as the same appears from the record and files in my said office.

WITNESS, my hand and seal of said Court this the 29th day of October, A. D. 1919.

A. G. RONALD, *Clerk,*

By————————, *D. C.*

and for other purposes," which Act is known as the "War Prohibition Act," the same being claimed to be unconstitutional under the Fifth Amendment to the Constitution of the United States and also as in conflict with the Eighteenth Amendment to the Constitution of the United States prohibiting the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes, said appellee insisting that under said amendment, the adoption of which by three-fourths of the States was proclaimed on January 29, 1919, by the Acting Secretary of State of the United States, the period of one year was allowed from said date during which said manufacture, sale, transportation, importation and exportation was permitted; that said War Prohibition Act further is asserted not to be now of force because it is claimed that same has expired according to its terms; that the bill of complaint is brought against appellant to restrain and enjoin him from refusing to permit appellee to withdraw the distilled spirits owned by it from bond for beverage purposes and from refusing to accept from said appellee the taxes due to the United States thereon.

Movant further shows that in said case a final decree was rendered on October 27, 1919, enjoining appellant as prayed, but that a petition for appeal to this Court, with assignments of error, being presented, the said appeal was allowed and said decree

meanwhile superseded; that by reason of the fact that said Eighteenth Amendment to the Constitution of the United States becomes of full effect after one year from its ratification, it is of great importance

[redacted]

which have been advanced for argument on December 8, 1919, and it is respectfully suggested that this case might conveniently be set for hearing at the same time as said two last-mentioned cases.

Counsel for appellee join in the request for the advancement of this case

ALEX. C. KING,
Solicitor General.

NOVEMBER, 1919.

○

Office Supreme Court, U. S.
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JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 589

ELWOOD HAMILTON, COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF KENTUCKY, Appellant,

versus

KENTUCKY DISTILLERIES & WAREHOUSE COMPANY, Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

APPELLEE'S SUGGESTIONS SUPPORTING THE GOVERNMENT'S MOTION TO ADVANCE.

LEVY MAYER,
WM. MARSHALL BULLITT,
Counsel for Appellee.

WESTERFIELD-BOOTH CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

ELWOOD HAMILTON, COLLECTOR, ETC., - - *Appellant,*

versus

KENTUCKY DISTILLERIES & WAREHOUSE COMPANY, - - - - - - - - *Appellee.*

Appeal from the District Court of the United States for the Western District of Kentucky.

APPELLEE'S SUGGESTIONS SUPPORTING THE GOVERNMENT'S MOTION TO ADVANCE.

The United States moved to-day (November 10th) to advance this case for an early hearing.

The appellee earnestly suggests that the case be assigned for hearing *during this current month* of November, 1919, because unless the case is promptly heard and decided, the mere lapse of a few weeks' time will, on account of the Eighteenth Amendment becoming effective, deprive the appellee of the benefit of the decision below and render valueless property worth many millions of dollars, to which, under the decision below, appellee and those interested with it, are constitutionally entitled.

Counsel fully recognize the unusual character of the request, but the extraordinary circumstances seem to justify it.

LEVY MAYER,
WM. MARSHALL BULLITT,
Counsel for Appellee.

November 10, 1919.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

ELWOOD HAMILTON, COLLECTOR OF INTERNAL REVENUE for the collection district of Kentucky, appellant,
v.
KENTUCKY DISTILLERIES & WAREHOUSE Company, appellee.

No. 589.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF FOR THE UNITED STATES.

This is a suit in equity by a distiller to enjoin a collector of internal revenue from refusing to accept tax on a quantity of whisky and to permit its removal from bond for beverage purposes. A motion to dismiss having been overruled, a final decree was rendered granting the injunction, to reverse which the collector prosecutes this writ of error.

THE STATUTE.

The action of the collector of which complaint is made was based on the act of November 21, 1918, 40 Stat., c. 212, pages 1045, 1046, which provides:

> That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the pres-

ent war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export.

THE FACTS.

The appellee, being the owner of a large quantity of whisky in bonded warehouses, tendered to the appellant the taxes which would be due and payable upon the removal from bond of the whisky which it asked leave to remove from bond to be sold for beverage purposes in the United States. Appellant refused to receive the taxes or permit the removal upon the ground that the removal from bond of whisky for beverage purposes, except for export, was prohibited so long as the statute above quoted should be in effect.

QUESTION INVOLVED.

The sole question involved is the constitutionality of the act when it was passed and of its enforcement when the bill was filed October 10, 1919. The appellee asserts that:

1. The prohibition in question is illegal, void, and unconstitutional, in that it operates to take private property for public use without just compensation

in contravention of the Fifth Amendment to the Constitution.

2. The act has terminated and ceased to be of legal effect.

ASSIGNMENTS OF ERROR.

The assignments of error which are found at page 29 of the record challenge the correctness of the above contentions.

BRIEF.

I.

The statute was enacted not under the general police power but under the war powers of Congress, and its validity depends upon whether it is an appropriate means of carrying into effect the war powers of the Federal Government. The Constitution, Article I, section 8; *United States* v. *Doremus*, 249 U. S. 86.

II.

Congress is empowered to enact any law which has a substantial relation to the successful conduct of the war and which is not forbidden by any express provision of the Constitution. *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S. 135, 149; *Gibbons* v. *Ogden*, 9 Wheat. 195; Willoughby on the Constitution, Vol. 2, section 715, p. 1212; *Legal Tender cases* 12 Wall. 563; *Stewart* v. *Kahn*, 11 Wall. 493, 506, 507; *Adair* v. *United States*, 208 U. S. 161, 179–180; *Employers' Liability cases*, 207 U. S. 463; *Trademark Cases*, 100 U. S. 82.

III.

The regulation or prohibition of the sale and manufacture of intoxicants has a substantial and reasonable relation to the end to be accomplished by exerting the power to declare war. *McCulloch* v. *Maryland*, 4 Wheat. 422; *Lottery case*, 188 U. S. 321, 355; *Stewart* v. *Kahn*, 11 Wall. 493, 506–507; 40 Stat., c. 15, sec. 12, p. 82; 40 Stat., c. 53, sec. 15, p. 282.

IV.

The motives of Congress or of individual Members of Congress can not be inquired into by the courts. *United States* v. *Des Moines &c. Co.*, 142 U. S. 510, 544; *Amy* v. *Watertown*, 130 U. S. 301, 319; *Weber* v. *Freed*, 239 U. S. 325, 330.

V.

The validity of the act is not affected by the fact that it partakes of the nature of a police regulation. *Hoke* v. *United States*, 227 U. S. 308, 323; *Wilson* v. *United States*, 232 U. S. 563, 567; *Seven Cases of Eckman's Alterative* v. *United States*, 239 U. S. 510, 515; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 215; Cooley's Constitutional Limitations, 732; *Gibbons* v. *Ogden*, 9 Wheat. 1, 202.

VI.

The statute does not constitute a taking of property and does not contravene the Fifth Amendment. *Mugler* v. *Kansas*, 123 U. S. 623, 668–669; *Kidd* v. *Pearson*, 128 U. S. 1.

VII.

The statute does not violate the Tenth Amendment.

VIII.

The question is in no way affected by the Eighteenth Amendment.

IX.

A state of war still exists and the statute is in effect whether demobilization is complete or not. *United States* v. *Anderson*, 9 Wall. 56, 70; *Hijo* v. *United States*, 194 U. S. 315, 323; *The Protector*, 12 Wall. 700.

X.

The validity of the statute is not affected by disagreement between the President and Congress as to the necessity for its being continued in force.

XI.

The power of Congress to determine conclusively the necessity for the exercise of its war powers, at any time, during the existence of a state of war, is absolutely essential.

ARGUMENT.

It is not claimed that this statute was enacted under the general police power. It is conceded, of course, that, until the Eighteenth Amendment becomes effective, Congress has no general police power to regulate the manufacture and sale of intoxicating liquors within the States. Its power in this regard is limited to the making of such laws as are neces-

sary and proper for carrying into effect the express powers conferred by the Constitution upon the Federal Government.

STATUTE ENACTED UNDER THE WAR POWERS OF CONGRESS.

The authority for the passage of the act of November 21, 1918, is found in Article I, section 8, of the Constitution, which includes in the enumeration of powers conferred upon Congress the power "to declare War, * * * to raise and support Armies * * * to make Rules for the Government and Regulation of the land and naval Forces," and, in the concluding provision of the same section, "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The provision last quoted is attached to every express power which is conferred upon Congress. Its effect is to authorize the enactment of all laws which are appropriate to the carrying into effect of the express powers of Congress and which are not in conflict with any other provision of the Constitution. For example, as an incident to the power of taxation, Congress has for years regulated and exercised a supervision over the manufacture of intoxicating liquors, and, in recent years, has, as an incident to the same power, imposed elaborate regulations and restrictions upon the sale of narcotic drugs.

United States v. *Doremus*, 249 U. S. 86. The question here, then, is not whether Congress has been given expressly the power to prohibit the sale or manufacture of intoxicants, but whether such a prohibition is an appropriate means for carrying into effect the war powers of the Federal Government.

NATURE AND EXTENT OF THE WAR POWERS OF CONGRESS.

This court has quite recently said:

> The complete and undivided character of the war power of the United States is not disputable. *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S., 135, 149.

This is merely a restatement, in different language, of what this court long ago, in speaking of the power of Congress to regulate interstate commerce, said:

> This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 195.

The power conferred upon Congress is to declare war and to enact such legislation as may be necessary and proper to conduct the war to a successful issue and restore the country to peace conditions.

> The constitutional power given to the United States to declare and wage war, whether foreign or civil, carries with it the authority to use all means calculated to weaken the enemy and to bring the struggle to a successful conclusion. * * * The power to wage war carries with it the authority not only to

> bring it to a full conclusion, but, after the cessation of active military operations, to take measures to provide against its renewal. (Willoughby on the Constitution, vol. 2, sec. 715, p. 1212.)

A war threatens the very life and existence of the Nation. While it exists its successful conduct is the matter of supreme importance, to which every other consideration must yield. The Constitution has not left the Federal Government without any necessary power to preserve its life and existence. In *Legal Tender cases*, 12 Wall. 563, the court said:

> It is absolutely essential to independent national existence that government should have a firm hold on the two great sovereign instrumentalities of the *sword* and the *purse*, and the right to wield them without restriction on occasions of national peril. In certain emergencies government must have at its command, not only the personal services—the bodies and lives—of its citizens, but the lesser, though not less essential, power of absolute control over the resources of the country.

To meet the necessities of war, therefore, the entire resources of the country and the bodies, lives, wealth, and property of the citizens are subject to the absolute control of the Government. This was recognized by Congress in the resolution which pledged every resource to the war service of the country. In other words, they are by the Constitution pledged to the defense of the Nation. And, in

speaking of the subject with special reference to the Civil War, it was said that—

> the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. (*Stewart* v. *Kahn*, 11 Wall. 493, 507.)

It may be safely stated, therefore, that Congress has ample power to enact any laws appropriate to the successful conduct of the war which are not forbidden by any provision of the Constitution. It may be conceded that, like all other powers of Congress, the war powers are subject to the limitation that legislation under them must have some real relation to the purposes of the war. *Adair* v. *United States*, 208 U. S. 161, 179–180; *Employers' Liability Cases*, 207 U. S. 463; *Trade-Mark Cases*, 100 U. S. 82. And the rule may be accurately stated to be that Congress is empowered to enact any law which has a substantial relation to the successful conduct of the war and which is not forbidden by any express provision of the Constitution.

THE REGULATION OR PROHIBITION OF THE SALE AND MANUFACTURE OF INTOXICATING LIQUORS HAS A SUBSTANTIAL AND REASONABLE RELATION TO THE END TO BE ACCOMPLISHED BY EXERTING THE POWER TO DECLARE WAR.

In determining the validity of a statute passed when the country is in a state of war and under the war powers of Congress, the courts are at liberty to inquire into but two questions: (1) Has the act a

substantial relation to the successful conduct of the war, and (2) is it prohibited by any express provision of the Constitution.

The inquiry into the relation between a statute and the purposes of the war does not involve an inquiry into the wisdom of or the necessity for a particular statute. When it is ascertained that the statute can reasonably be said to have any effect upon the war the required relation exists. Individual judges may be of opinion that the measure is unwise, or even that its effect will be detrimental to the war interests of the country. But if it is calculated to affect in any way the result of the war, the question as to whether it is a proper or the best means to be employed is one committed solely to the judgment and discretion of Congress. In *McCulloch* v. *Maryland*, 4 Wheat. 422, it was said:

> But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This court disclaims all pretensions to such a power.

And in the *Lottery case*, 188 U. S. 321, 355, it was said:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

And in *Stewart* v. *Kahn*, 11 Wall. 493, 506, in speaking of the war powers of Congress, the court said:

> The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution.

Almost immediately upon the declaration of war in 1917, Congress took the view that the manufacture and distribution of intoxicating liquors would have an effect on the conduct of the war from two standpoints. The beverage use of intoxicants by those engaged in the military or naval service was regarded as detrimental to their efficiency, and the use of men and food products in the manufacture of intoxicants was deemed an unnecessary drain upon the resources of the country. Accordingly, as early as May 18, 1917, an act was passed forbidding the sale of intoxicants to soldiers or sailors or within certain zones established about military camps. (40 Stat., c. 15, sec. 12, p. 82.) And in August, 1917, the food-control act, prohibiting the use of food products in the manufacture of distilled liquors was passed. (40 Stat., c. 53, sec. 15, p. 282.) The power of Congress to pass both of these acts would doubtless not be questioned for a moment by anyone. The food-control act also conferred upon the President the power to regulate or prohibit the use of food products in the manufacture of malt or vinous liquors whenever, in his opinion, such regu-

lation or prohibition should be necessary. The President at various times exercised this power and the validity of his action would scarcely be questioned.

In November, 1918, the act now in question was passed. From the passage of the food control act in August, 1917, the manufacture of distilled spirits had been unlawful, but the Federal Government had not interfered with the sale of such spirits previously manufactured except to the extent that these sales were prohibited by the act of May 18, 1917. An armistice had been signed and actual hostilities had ceased pending negotiations for peace. There was an Army in Europe and this country of about 4,000,000 men under arms. The terms of the armistice were such that the President had expressed to Congress the opinion that Germany would never be able to resume hostilities. Until peace should be an accomplished fact, however, the country was still at war, and no man could know certainly what would happen or what the war necessities would be. It might become necessary to occupy Germany to compel a satisfactory treaty. In this situation, Congress, with the approval of the President, determined that the time had not arrived when it would be safe to abandon all the measures which had been adopted for the defense of the Nation. The duty rested upon Congress to keep the country and its armies in condition to act promptly and effectively in any emergency that might arise so long as a state of war continued. Apparently, it was anticipated that it would not be necessary to keep the entire Army in the field,

but that demobilization would be commenced and gradually proceeded with. But Congress was of opinion that the restriction upon the use of food products in the manufacture of intoxicants should not be removed and that the use of intoxicants by soldiers in the service or by those from whom soldiers would be drawn in case of a renewal of hostilities or must be depended upon to carry on the necessary industries of the country in the event of such a resumption of hostilities should be prohibited. Accordingly, the act now in question was passed and approved by the President.

In thus adopting, as war legislation, measures dealing with the liquor traffic Congress necessarily decided that that traffic would have an effect detrimental to the war interests of the country. It is not to be supposed that every individual would agree that the decision was a wise one; not all Members of Congress were in accord. There are undoubtedly those who believe that it was an unwise measure. There are those who even believe that a moderate distribution of liquors among the soldiers themselves tends to increase the fighting efficiency of the Army. There are those who believe that the suppression of the manufacture and sale of liquor has a depressing effect upon the financial condition of the country, and hence impairs its ability to meet the necessities of the war. On the other hand, there are those who believe that the use of liquor by soldiers is highly detrimental to the morale of the Army, and that the withdrawal of men and food products from the manufacture of liquor

greatly increases the ability of the country to do those things necessary for the successful conduct of the war. It is obvious, however, that both opinions imply that the prohibition of the manufacture and sale of intoxicants will have an effect upon the war either for good or evil. This establishes a substantial relation between the statute in question and a proper exercise of the war powers of Congress. Whether the effect will be for good or evil must be decided by somebody, and, as shown by the authorities above quoted, the power to make this decision has been vested in Congress and not in the courts. The measure was passed when the country was in a state of war. It was avowedly passed under the war powers of Congress and to promote the success of the war. The question, therefore, of whether it was necessary or whether it was the best means that could be employed is not a justiciable question and is conclusively settled by the act of Congress.

THE MOTIVE OF CONGRESS OR OF INDIVIDUAL MEMBERS OF CONGRESS CAN NOT BE INQUIRED INTO.

It has been charged that the purpose of the act, as stated on its face, was a mere pretense resorted to by Congress to usurp the power to make local police regulations. The mere statement of the proposition makes obvious its startling and revolutionary character. This court, with its very proper respect for the rights and dignity of the coordinate branch of the Government, has never, in its history, assumed such a power. It has never, in all the cases decided by it, assumed to say that an act of Congress reciting its

purpose was void because the court found it was enacted from improper motives or for the purpose of usurping power over local affairs.

Nothing is better settled than that if an act of Congress deals with a subject over which that body has power it is not for the courts, in determining its validity, to inquire into the motives which led to its passage. Its validity depends upon what it is and not upon whether its enactment was prompted by proper or improper motives. *United States* v. *Des Moines, &c. Co.*, 142 U. S., 510, 544; *Amy* v. *Watertown, No. 1*, 130 U. S., 301, 319; *Weber* v. *Freed*, 239 U. S., 325, 329–330.

THE VALIDITY OF THE ACT IS IN NO WAY AFFECTED BY THE FACT THAT IT PARTAKES OF THE NATURE OF A POLICE REGULATION.

It is true that Congress had no power to enact a prohibition law merely as a police regulation. It is also true that the general police powers of government are vested in the States; but it is not true that the Federal Government is entirely without police powers. It may exercise such powers to the extent necessary to make effective the powers expressly granted. Thus in *Hoke* v. *United States*, 227 U. S., 308, 323, speaking of the power of Congress over interstate transportation, it was said that—

> the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations.

And in *Wilson* v. *United States*, 232 U. S., 563, 567, speaking of the white-slave law, which was held constitutional, the court said:

> As has already been decided, it has the quality of a police regulation, although enacted in the exercise of the power to regulate interstate commerce.

In *Seven Cases of Eckman's Alterative* v. *United States*, 239 U. S. 510, 515, it was said:

> Congress is not to be denied the exercise of its constitutional authority over interstate commerce, and its power to adopt not only means necessary but convenient to its exercise, because these means may have the quality of police regulations.

And an even more direct statement to this effect is:

> Congress may establish police regulations as well as the States, confining their operations to the subjects over which it is given control by the Constitution; * * * *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., 196, 215, citing Cooley's Constitutional Limitations, 732.

In other words, when necessary for the proper exertion of its express powers, Congress may use exactly the same means which the State may use for the exertion of its own powers. This is no new doctrine. In *Gibbons* v. *Ogden*, 9 Wheat. 1, 202, it was said:

> It is obvious, that the Government of the Union, in the exercise of its expresspowers, that, for example, of regulating commerce

> with foreign nations and among the States, may use means that may also be employed by a State, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State.

The right of the State to enact prohibition rests upon its power to pass laws for the protection of the public health, morals, and safety. The power of Congress in time of war is to enact such legislation as is necessary to protect the safety of the Nation or the efficient exercise of the war powers. A State may prohibit the sale of liquor because its legislature determines that such sale is detrimental to the public health, morals, or safety. In time of war, when the safety of the Nation is the question of supreme importance, Congress may use the same means and prohibit the sale of liquor if, in its judgment, such sale is detrimental to the safety of the Nation, or promotes its efficiency in war.

ACT NOT IN CONFLICT WITH THE FIFTH AMENDMENT TO THE CONSTITUTION.

As we have seen, if the prohibition of the liquor traffic has any substantial relation to the successful conduct of the war, and this can scarcely be denied, the only remaining question is whether the passage of the statute in question is forbidden by any provision of the Constitution. The claim is that appellee's property is taken for public use without compensation and, therefore, the Fifth Amendment to the Constitution is violated. It is not claimed that the Government has appropriated the whisky in ques-

tion, or has devoted it, or required it to be devoted, to any public use. On the contrary, the claim simply is that, by denying appellee the right to sell it during the period prescribed, the law has destroyed property rights. So far as the Government has had occasion to use distilled spirits, they have been treated just like any other property taken for public use. The Food Control Act, which prohibited the further manufacture of distilled spirits, gave to the President the right to take over for the Government any distilled spirits that might be needed for war or governmental purposes, and provided that compensation therefor should be made. The spirits now in question are those which the Government has had no occasion to use and hence has not taken over. That an act of a State legislature forbidding the sale of intoxicating liquors upon the ground that they are injurious to the health, morals, or safety of the community is not a taking of property for public use is thoroughly settled by the cases of *Mugler* v. *Kansas*, 123 U. S. 623, 668–669, and *Kidd* v. *Pearson*, 128 U. S. 1. In the former case, dealing with a State prohibition statute, it was said at pages 668–669:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community can not, in any just sense, be deemed a taking or an appropriation of property for the public benefit.

And again:

> The power which the States have of prohibiting such use by individuals of their prop-

> erty as will be prejudicial to the health, the morals, or the safety of the public is not—and, consistently with the existence and safety of organized society, can not be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case a nuisance only is abated; in the other unoffending property is taken away from an innocent owner (p. 669).

It is true that it was the Fourteenth Amendment which was invoked in that case, but there can now be no doubt that the restriction imposed by the Fifth Amendment upon the Federal Government is identical in effect with that imposed by the Fourteenth Amendment upon the States. In adopting such measures as it deems necessary for the proper maintenance and support of the Army and the conduct of the war, Congress exercises the same kind of power which the States exercise by passing legislation to prevent the use of property for purposes deemed injurious to the health, morals, or safety of the community. Surely, the power to prevent the use of property which it is believed by Congress will

impair the ability of the Nation to successfully conduct the war can be no less extensive than the power of a State to enact similar legislation for the protection of the health, morals, or safety of the community. When the life of the Nation is at stake the power of the Government to restrict the use of property surely can be no less than the power of a State in ordinary times to protect the health or morals of its citizens. The nature of the power is identical in both cases. It is not a taking of property in any sense.

In both cases the citizen is denied the right to make a noxious use of his property. This obligation inheres in the ownership of all property. There is no inherent right to use property in a way that will be detrimental to the public. The use of property under certain circumstances and conditions may be entirely harmless and under other circumstances and conditions vitally injurious to the public. In times of peace there is no right to use it so as to injure the morals or the health of the community, and a State may prohibit such use without making compensation. So in time of war there is no right to use it in a way which will impair or interfere with the efforts of the Government to successfuly conduct the war, and Congress has the same power to prohibit such use. When, therefore, a citizen has been denied the right to use his property in a way that will injure the public, in view of existing circumstances, he has simply been required to do what is required by one of the basic principles of our laws of property. It can not

be said, therefore, that an act of this kind takes his property without compensation or without due process of law.

NO VIOLATION OF THE TENTH AMENDMENT TO THE CONSTITUTION.

It has sometimes been said that this statute violates the Tenth Amendment by exercising powers which that amendment reserved to the States. What has already been said is a sufficient answer to that contention. The power exerted was expressly delegated to Congress in the power to pass all such laws as should be necessary and proper to make effective the declaration of war. If it be, therefore, a power delegated to Congress, its exercise was no encroachment upon the reserved rights of the States.

QUESTION NOT AFFECTED BY THE EIGHTEENTH AMENDMENT.

A contention somewhat difficult to understand has been made that this act is void because in conflict with the Eighteenth Amendment, which makes the sale and manufacture of intoxicating liquor unlawful after the lapse of one year from its ratification. It was ratified in January, 1919, and hence it does not affect the sale or manufacture of liquor until January, 1920.

To sustain the contention, it is necessary to make this amendment read as though it said: "The sale or manufacture of intoxicating liquors shall be lawful until one year after the ratification and thereafter unlawful." The language used will bear no such

construction. It simply leaves the liquor traffic where it was until January, 1920. At the time it was ratified by the requisite number of States, the sale and manufacture of intoxicants were prohibited by law in a majority of the States. It had been previously prohibited during the period of the war and demobilization by act of Congress. The amendment does not purport to confer upon those engaged in the business any rights which they did not already have. On the contrary, its whole purport was to take away from them, upon a certain date, the rights they were then exercising.

This amendment was submitted by Congress to the States in December, 1917, four months after the manufacture of distilled spirits during the period of the war had been prohibited. The purpose of the amendment had no relation to the war powers of Congress. The object, on the contrary, was to enlarge the powers of the Federal Government in ordinary times. The States, therefore, acted upon it with full knowledge that Congress had the power during the war to exercise complete control over the liquor traffic, and was already exercising that power to the extent of prohibiting the manufacture and limiting the sale.

At the time the act of November 21, 1918, was passed only thirteen States had ratified the Eighteenth Amendment. The remaining thirty-one States which subsequently ratified it did so with full knowledge that Congress had already prohibited both the manufacture and the sale of distilled spirits

during the war. If they had desired that there should be a year after the war prohibition ceased to be effective in which the sale of liquor would not be unlawful, they had only to delay ratification. They however, ratified. The result is that until January, 1920, the manufacture and sale of intoxicating liquors remain subject to such powers of Congress and the several States as existed prior to the ratification of the amendment. The insistence is that after the ratification of the amendment not only was Congress powerless to pass a prohibition act under the war powers, but that the act which it had already passed was nullified. This would give to the amendment before its effective date a most sweeping effect. That amendment, like all other parts of the Constitution of the United States, is the supreme law of the land. If it makes a previous act of Congress on this subject void, it must have the same effect upon laws of the various States. The logic of the argument, therefore, is that the adoption of this amendment nullifies every State or Federal law which prohibits the manufacture, sale, or transportation of liquor, and that such manufacture, sale, or transportation is until January, 1920, lawful, notwithstanding any previously enacted State or Federal law. The fallacy in the argument is that the amendment confers no rights whatever upon those engaged in the liquor traffic, but merely provides that, after a certain date in the future, the rights which they now have will no longer exist.

STATUTE HAS NOT CEASED TO BE EFFECTIVE.

The contention will be made that the act is no longer effective because the emergency which caused Congress to pass it no longer exists. The time within which it should be effective was fixed on its face. It was to be a law—

> until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States.

It was passed after the signing of an armistice which is still in effect. Nothing has since occurred except that the Army has been largely and perhaps completely demobilized, and various steps have been taken toward restoring the country to a peace basis in anticipation of a treaty of peace expected to follow the armistice. The possibility of a resumption of hostilities is as great now as it was last November. It is difficult, therefore, to see how it can be said that the act is no longer effective unless it can be said that Congress had no power to pass it on November 21, 1918. When the act was passed, it was obviously assumed that the war would terminate by a treaty of peace before our 4,000,000 soldiers could be demobilized, and therefore it was intended that the statute should remain in effect for a period following the treaty of peace during which the Army would be in process of demobilization.

Contrary to this anticipation, however, it may be that demobilization has been or will be completed

before the war terminates by a treaty of peace being put into effect. At any rate, the question of the power of Congress to keep in effect such legislation after a treaty of peace does not now arise, and in all probability never will. According to the terms of the act two things—the termination of the war and demobilization—were required to occur before it should become inoperative. If, therefore, we have not reached the termination of the war, the act is still in effect. There ought not to be at this late date any difficulty in determining what can legally put an end to the war. Ordinarily, a war between belligerent countries is terminated by a treaty of peace. There have been wars, of course, at the conclusion of which there was no treaty. One Government may be completely overthrown and one belligerent brought under the dominion of the other, so that there is no occasion for a treaty. But, so far as legal rights depend upon the termination of a war, the date of termination must be fixed by some act of the political department of the Government. Thus, in speaking of the Civil War, this court held in the case of *The Protector*, 12 Wall. 700, that:

> The beginning and termination of the late rebellion, in reference to acts of limitation, is to be determined by some public act of the political department. Its termination as to certain States will be referred to the proclamation of April 2, 1866, declaring the war had closed in those States; as to Texas, the proclamation of the 20th of August, 1866, declaring it had closed in that State also.

In the present case, hostilities have been suspended as the result of a written armistice in which, of course, the existence of a state of war was recognized and the belligerents engaged to endeavor to negotiate a treaty of peace. In such a case it is in contemplation of the parties that only a treaty of peace will terminate the war or a state of war. It is well settled that until a treaty of peace has been made effective a foreign war can not be said to have ended. *United States* v. *Anderson*, 9 Wall. 56, 70; *Hijo* v. *United States*, 194 U. S. 315, 323.

There were many cases following the Civil War, and some following the Spanish War, in which the rights of the Government or the rights of litigants depended upon the date at which the war ended. This expression is used in a colloquial and also in a legal sense. Thus, in a general way, history records, and any intelligent person would say in answer to an ordinary question, that the Civil War ended in the spring of 1865 when the last of the Confederate Armies surrendered. In a colloquial sense this is true. But wherever a right depended upon the date of the termination of that war it was held that it did not in any legal sense end with the surrender of the armies. On the contrary, it was held that this surrender did not constitute an end of the war, but that, as the date of the beginning of the war must be some official act, so it could only be terminated in the same way. Hence, it was always held that legally the war did not end until the proclamation of the President to that effect, and hence the date

of the legal termination of the Civil War is August, 1866, and not May, 1865.

This was the ruling in the case of a war that did not and could not terminate in a treaty of peace, for the reason that one of the belligerent Governments was entirely overthrown and the portion of the country which had been under the control of that Government came back under the control of the Government of the United States. There was, therefore, no occasion for a treaty and no Government to make it. The ability to renew hostilities was more completely destroyed than was the ability of the German Government to renew hostilities destroyed by the armistice of last November, and yet it was held that, for all purposes which came before the courts, the Civil War did not end until August, 1866. *United States* v. *Anderson*, 9 Wall. 56, 70. If this was true in a case where one of the belligerents had unconditionally surrendered and was absolutely in the power of the other, much more must it be true where, as in this case, instead of a surrender, the belligerents have entered into a solemn writing which expressly recognizes the existence of a state of war and constitutes merely an agreement to suspend hostilities until an effort can be made to end the war by a treaty of peace.

Exactly the same conditions that now exist existed during the period beginning with the signing of a protocol by Spain and the United States, on August 12, 1898, and the ratification of a treaty of peace, in April, 1899. And this court said that a state of

war did not, in law, cease until the ratification in April, 1899, of the treaty of peace. *Hijo* v. *United States*, 194 U. S. 315, 323.

Indeed, it will scarcely be denied that legally the country will be in a state of war until a treaty of peace is put into effect. This, it seems, must be conclusive of the case unless it can be said that the courts may assume to determine whether during the period of an armistice there is any emergency which justifies the exertion of the war powers of Congress. The fallacy in the argument is in assuming that the validity of legislation enacted under the war power depends upon whether the courts agree with Congress that actual conditions during a period of war, or while the country is in a state of war, require the exertion of such power. To apply such a rule would throw the conduct of a war into hopeless confusion. It would make subject to the control of the courts every war measure passed by Congress and would make the validity of those measures depend upon the opinion of the courts rather than of Congress as to what measures conditions arising in the course of war may make necessary or proper. Plainly, it was never intended that the ability of the Nation to defend itself and to prosecute wars should be hampered and impaired by such divided authority.

It is true that an emergency is necessary to justify the exertion by Congress of its war powers. It is a mistake to say, however, that the *power* of Congress is dependent, when war is once declared, upon contingencies that arise during the progress of the war.

These contingencies, of course, control Congress in determining matters of policy and in shaping legislation for the conduct of the war. But the emergency which brings into existence the right to use these war powers is the declaration of war. When, therefore, the validity of a measure purporting to be a war measure is called in question, the courts must determine whether a state of war exists. When, however, it appears that Congress has declared war and that war has not been terminated by any official action of the political branch of the Government, the inquiry ends. Congress may do things which to the individual judge may seem foolish and wholly unnecessary. But it is upon Congress that the duty has been imposed of passing measures necessary for the conduct of the war, and therefore these questions must be determined by its judgment, which is not subject to review by the courts. In other words, the existence of a state of war gives the right to use the war powers, and the extent to which they shall be used is solely for the determination of Congress.

VALIDITY OF THE ACT NOT AFFECTED BY DISAGREEMENT BETWEEN CONGRESS AND THE PRESIDENT AS TO THE NECESSITY FOR ITS BEING CONTINUED IN FORCE.

It will be insisted that certain statements made by the President in communications to Congress conclusively establish the fact that no emergency now exists which can justify continuing this prohibition law in effect. The contention seems to be threefold. The first contention is that the mere existence of a

state of war is not sufficient, but that some other actual emergency arising during a state of war must be shown; that the question of the existence of such an emergency is a justiciable question, and that the opinion of the President should be accepted by the courts as conclusive. The second contention seems to be that if the question is not justiciable, but is one which must be determined by the political branch of the Government, the power to determine it rests in the President. The third contention is that the act itself leaves it to the President to determine how long the emergency exists.

The President approved the act of November 21, 1918. It may be, therefore, assumed that he was in entire agreement with Congress that a war emergency then existed which justified the act. Previously, on November 11, 1918, in announcing the terms of the armistice to Congress, he stated in effect that the war was ended because the terms of the armistice were such that it would be impossible for Germany to resume hostilities. This statement can not be used to sustain the present contention. Subsequent to that date Congress enacted and he approved the act in question, and therefore neither can be said to have regarded the war as legally ended or the war emergency as having passed. The argument, however, is based upon two other statements made by the President to Congress. On May 20, 1919, he recommended to Congress not the repeal of the entire act, but the repeal of so much of it as prohibited the

manufacture and sale of wines and beers. His language was:

> The demobilization of the military forces has progressed to such a point that it seems to me entirely safe now to remove the ban upon the manufacture and sale of wines and beers.

This limited recommendation, of course, implies that he did not regard demobilization to have progressed to such an extent that it would be safe to remove the ban upon the manufacture and sale of distilled spirits, which is the only part of the act now in question. He recognized the continued existence of the war powers.

Congress, however, disagreed with the opinion of the President that it would be safe to repeal any part of the statute, and instead of adopting his recommendation passed an act providing for the strict enforcement of the war prohibition. On October 27 the President vetoed this act. He did not place his veto upon the ground that Congress lacked the necessary power, but upon the ground that, as a matter of policy, it was not longer, in his judgment, necessary to continue the prohibition in effect. Referring to the act of November 21, 1918, he said:

> It has to do with the enforcement of an act which was passed by reason of the emergencies of the war, and whose objects have been satisfied in the demobilization of the Army and Navy.

It will be observed that, in neither of these statements, did the President state, or intimate, an opinion that the war was legally ended, or that during a state of war Congress did not have the *right* to exercise its war powers to the extent which was in its judgment necessary. In both communications he was performing his constitutional function with respect to the enactment of legislation. He was in one case recommending legislation which he deemed proper, in the other he was disapproving legislation which he regarded as unnecessary. In both, however, he was not questioning the power of Congress, but was addressing himself to the judgment of a body whose action, in connection with his own, was required for the passage of legislation.

The contention that the necessity during a state of war for the exercise in a particular way of the war powers is a justiciable question is, we think, sufficiently answered by what has been said. The insistence, however, is made that treating that as a question to be decided by the political branch of the Government, the President as a part of the political branch has the right to decide it. There are, of course, matters in which the President, as executive, is vested with the power to act, and in which his judgment and discretion are conclusive. In the actual conduct of the war there are many things with respect to which his power is absolute. But neither the power to declare war nor to pass such laws as are necessary for the conduct of the war is vested in him, except as he is given a part in the

enactment of legislation. He is the Commander in Chief of the Armies of the United States, but the power to raise and support these armies is conferred upon Congress. Without a necessary law passed by Congress he is powerless to draft into the armies a single man, and without an act of Congress he is powerless to raise a single dollar for the support of the Army or the conduct of the war. The question involved here is not where the armies shall be sent, or how they shall be used, but what laws are necessary to support them and to conduct the war to a successfull issue. Upon a declaration of war, Congress, and not the President, decides how large an army shall be raised. In the case of the present war Congress provided for an army by making subject to the call of the President all men between the ages of 21 and 31. There might have been a difference of opinion between the President and Congress as to whether this army was larger or smaller than was necessary, and as to whether the proper method for raising it had been adopted. But if this difference of opinion had arisen and the President's opinion had been overriden by a two-thirds vote of the two Houses, the legislative will of the Nation would have been thus expressed.

The result was the same when the President approved the act of Congress. Thereafter he was powerless to draft into the service any man not within the ages mentioned. Later both Congress and the President concluded that even a larger army would be necessary, and an act was passed making

subject to draft men as young as 18 and as old as 45 years. The men subject to draft under both these acts were so subject because the legislative will to that effect had been constitutionally expressed. On all questions relating to the raising of the Army, and to supporting the Army by keeping the country in condition to make its resources best available, the President's opinion would count for no more than the opinion of any individual, if two-thirds of the Members of both Houses of Congress by legislative act expressed a contrary opinion. The President could not have made the act of November 21, 1918, a law without the concurrence of Congress. Congress could not have made it a law without his concurrence unless passed over his veto. When the law was once passed the President was powerless to repeal it, or continue it in force against the constitutionally expressed will of Congress.

The purpose expressed in the act was both to protect the soldiers themselves against impairment of their efficiency through the use of intoxicating liquors, and to withdraw man power and food products from nonessential employment and devote them to such employment as would tend to keep the country in a safe condition to support the armies and to meet any exigencies that might arise in the course of the war. The possibility of such exigency would, of course, continue until peace was finally established and the country restored to a peace basis. The necessity for such measures would, of course, decrease as the probability of final peace in

the near future should increase. But at what stage of demobilization it would be safe to lift the ban against the sale of intoxicating liquor, or to permit man power and food products to be again used in the manufacture of intoxicating liquor, were questions to be determined by the same judgment and discretion that were involved in the original adoption of such measures.

In May, 1919, the President, evidently attaching more importance to the protection of the soldiers themselves than to the purpose of conserving food and man power, was still apparently of the opinion that conditions had not reached the point when it would be safe to lift the ban from *distilled spirits;* however, he was of opinion, that, under conditions then existing, the manufacture and sale of wine and beer could be safely permitted. This, however, was a question for legislative determination, and he therefore took the only course that was open to him by recommending to Congress the repeal of the law so far as it related to wine and beer. Congress, however, disagreed with him and did not act upon the recommendation. Instead, in October of the present year, it passed an act providing for the more efficient enforcement of the law. The question thus came again before the President in his legislative capacity. He disagreed with Congress and felt that, since demobilization was practically complete, it was not necessary to keep the law longer in force, although the war had not terminated and the country was still in a state of war.

It was merely a difference of opinion as to the extent to which it was still necessary to exert the war power of Congress. Congress was of a different opinion, and by the legislative will, constitutionally expressed, passed the law over his veto. Just as the legislative will was in November, 1918, expressed, with the President's concurrence, to the effect that this particular exercise of the war powers was necessary and proper, so the same legislative will was expressed, over the President's veto, in October, 1919, that the same necessity still existed. When it is remembered that this was a matter with respect to which the President had no constitutional power to act independent of Congress, and with respect to which Congress had the constitutional power to act contrary to the President's will, it is difficult to see how it can be said that the President's view as to the necessity of continuing this law in force is an authoritative determination of that question.

The contention that the act itself leaves it to the President to determine when the emergency ceases to exist is equally difficult to comprehend. Of course, when the act was passed it was entirely uncertain how long the emergency—that is, a state of war—would exist. Congress might very well, if it had seen fit, have provided that the law should be in effect as long as the President considered it necessary. In the Food Control Act, in dealing with beer and wine, it had adopted this policy by empowering the President to regulate or prohibit the manufacture of such beverages to whatever extent he found

necessary, but in the act of November 21, 1918, this policy was not adopted. Congress apparently decided to keep the matter within its own control, as it had a right to do. It therefore, in effect, enacted that the law should remain in force as long as it was competent under the Constitution to exert the war powers of the Government. Of course, if conditions should later arise under which Congress deemed the law no longer necessary its repeal would be an easy matter. But the purpose was clear to leave it in force during the entire period when the war powers could be exerted unless Congress should itself sooner determine to repeal it. The only reference to the President in the act is that he is to determine and proclaim the date of the termination of demobilization. The conclusion of the war had come to have a definite legal meaning through the decisions of this court. Until such a conclusion was reached the law was to be in force, and thereafter it should remain in force until the President should proclaim that demobilization had terminated. Of course, demobilization might have terminated before the conclusion of the war by the putting into effect of a treaty of peace. If so, the period of demobilization would be covered by making the conclusion of the war operate to end the law, but the concern of Congress was for a possible period after the conclusion of the war when the demobilization of the Army would be in progress.

The full purposes of the act, therefore, are met by holding that the law will cease to be in effect whenever two things have occurred, the demobilization of

the Army and the conclusion of the war, and not until then. If the act was susceptible of the construction, however, that the power was conferred upon the President to declare or to proclaim the war concluded at an earlier date than the ratification of a treaty, the appellee's case would not be helped. In that event, in order to put an end to the law, it would be necessary for him to proclaim both the conclusion of the war and the termination of demobilization. He has done neither. It may be assumed from the statement made in his veto message, that he regards demobilization as terminated and that he is ready to proclaim that fact whenever, through the termination of the war, such a proclamation will have any effect. But even if this statement could be taken as a proclamation declaring demobilization terminated, the fact remains that he has not expressly or by intimation declared in any form that the war is concluded. On the contrary, he is exercising every day war powers delegated to him by Congress and has very recently taken the position that a contract between miners and coal operators, which by its terms was to be in effect during the period of the war, was still a binding contract.

It is most respectfully submitted, therefore, that there is no sound reason for saying that anything which the President has said or done can operate to render inoperative the statute in question, or to furnish evidence that will be conclusive, or even admissible, in any court.

THE POWER IN CONGRESS TO DETERMINE CONCLUSIVELY THE NECESSITY FOR THE EXERCISE OF ITS WAR POWERS AT ANY TIME DURING THE EXISTENCE OF A STATE OF WAR IS ABSOLUTELY ESSENTIAL.

To hold that anything more than a declaration of war and the existence of a state of war is necessary in order to bring into play the war powers of Congress would be destructive of the ability of the Government to efficiently and successfully conduct a war. The war powers to be effective must be exerted promptly and without interference. A declaration of war puts at stake the very life of the Nation. There is no fixed rule or standard by which it can unerringly be determined what will be necessary to defend the country and win the war in any case. The judgment of some branch of the Government must control. To make the necessity for every measure which Congress may deem necessary during a period of war subject to review by the courts before it could be executed would be intolerable. Ultimate authority must be vested somewhere. The theory of our Government is that no one of the coordinate branches of the Government is, within its own sphere, any more infallible or less liable to make mistakes than the other. Hence when the Constitution conferred on the lawmaking branch of the Government the power to declare war and, with it, the power to pass such laws as may be necessary and proper in order to successfully conduct the war, it denied to every other branch of the Government the power to question the necessity for the measure so passed.

To say that any other authority may review this judgment of Congress as to the particular measures required by exigencies arising during the war would be to embarrass and render inefficient the exercise of the powers intrusted to Congress. It will scarcely be denied that what has just been said is entirely sound when applied to a period during which the belligerents are engaged in actual hostilities.

But it will be well to consider what it would mean to say that a mere armistice can have the effect of suspending or abrogating any of the war powers of Congress. It is true that we all hope and firmly believe hostilities will not be resumed in the present war, but certainly the power of Congress can not be made to depend upon somebody else's judgment as to the probability or improbability of such a resumption of hostilities. The duty of Congress, during an armistice which may, by any possibility, end with a resumption of hostilities, to be prepared for a continuance of the war is just as imperative as the duty to vigorously prosecute the war during hostilities. If in this case, on account of a strong improbability of an active continuance of the war, Congress is stripped of its war powers, then a precedent is established under which the signing of any armistice would have the same effect. Many may differ widely with Congress as to what is necessary and proper to do in order to meet any exigency of the war that may yet arise. But the responsibility for such action as is taken, or for a failure to take action that may hereafter be found necessary, rests alone upon Con-

gress, and it is respectfully submitted that the Constitution has placed the power to act nowhere else. In short it is the declaration of war and not any particular exigency that may actually arise in the course of the war which brings into play the war powers of Congress.

CONCLUSION.

In conclusion it is respectfully submitted that the act of November 21, 1918, was constitutional when passed, and its enforcement now is likewise constitutional, and the judgment of the District Court should be reversed.

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NOVEMBER, 1919.

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In the United States Supreme Court.

OCTOBER SESSION, 1919.

NO. 589.

ELWOOD HAMILTON, COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF KENTUCKY,
Appellant,

vs.

KENTUCKY DISTILLERIES AND WAREHOUSE COMPANY,
Appellee.

Brief "Amicus Curiæ," for Appellant.

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BRIEF "AMICUS CURIAE"

ON CONSTITUTIONALITY OF WAR PROHIBITION ACT.

Agreeable to the permission of the court, this brief is filed as "Amicus Curiae," in the hope that some of the suggestions and authorities cited may prove helpful in consideration of the case.

POINTS AND AUTHORITIES.

I.

The War Prohibition Act is constitutional because it has a reasonable relation to the recognized authority of Congress to support the Army and Navy, and to other war powers. It conserves the essentials to an adequate support of the Army and Navy by preventing the waste of food, fuel, transportation facilities, and man-power used in the manufacture and sale of beer, wine, and other intoxicating liquors. (*Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *U. S.* v. *Doremus*, 249 U. S. 386; *Hoke* v. *State*, 227 U. S. 309.) (Official Report of Hearings on War Prohibition Act, Sixty-fifth Congress, second session, H. R. 11945.)

II.

The War Prohibition Act does not take private property for public use without just compensation. The decisions of the courts are uniform that the Government may prohibit the liquor traffic entirely without providing any compensation to the liquor dealers. (*Mugler* v. *Kansas*, 123 U. S. 623; *Gas Co.* v. *Light Co.*, 115 U. S. 650; *Menken* v. *City of Atlanta*, 78 Ga. 677.)

III.

The 18th amendment gives no guarantee to the liquor traffic to continue during the year from the date of ratification by 36 States. (Section (1), Article 18, of the Constitution; *Stone* v. *Miss.*, 101 U. S. 814; *Kresses* v. *Lyman*, 74 Fed. 763; *Moore* v. *Indianapolis*, 120 Ind. 483; *Clarke Dis. Company* v. *Western Maryland*, 242 U. S. 311.)

IV.

The war has not ended nor has demobilization terminated by the proclamation of the President of the United States. (*The Protector*, 12 Wall, *700 Hijos* v. *U. S.* 194 U. S. 315. *Commercial Cable Co.* v. *Albert Burleson and N. Carlton, Scatena, et al.*, v. *Coffey.*)

V.

PRESUMPTION OF CONSTITUTIONALITY.

United States v. *Harris*, 106 U. S. 635; *A. T. R. Co.* v. *Mathews*, 174 U. S. 96; *Brown* v. *Walker*, 161 U. S. 590.

ARGUMENT.

THE WAR PROHIBITION ACT.

November 21, 1918, Congress adopted as a part of the Food Stimulation Act the following:

> "That after June 30, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving man-power of the nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, *and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export.*

CONSTITUTIONALITY OF THE WAR PROHIBITION ACT.

The War Prohibition Act of August 10, 1917, prohibited the use of food materials in the production of distilled spirits for beverage purposes. The act of November 21, 1918, prohibited the sale of distilled spirits for beverage purposes. The act of November 21, 1918, pro-

hibited the sale or withdrawal from bond of distilled spirits for beverage purposes and the sale of beer and wine or other intoxicating malt or vinous liquors for beverage purposes after June 30, 1919, and prohibited grains and food products from being used in making beer, wine, and other intoxicating malt and vinous liquors. The act is to continue in effect until the conclusion of the present war and thereafter until the termination of demobilization, the date of which should be determined and proclaimed by the President of the United States.

CONGRESS HAS POWER TO ADOPT A WAR PROHIBITION ACT.

Congress has the power to raise and support the Army and maintain the Navy, provide for the common defense and general welfare, and make all laws necessary to carry into execution all the powers vested in the Constitution. Article 1, Section 8, of the Constitution, among other things provides:

> The Congress shall have power "to declare war."
>
> The Congress shall have power "to raise and support armies."
>
> The Congress shall have power "to provide and maintain a navy."
>
> The Congress shall have power "to provide for the common defense and general welfare of the United States."
>
> "The Congress shall have the power to make all laws which shall be necessary and proper for carrying into execution the foregoing power."

These provisions of the Constitution authorize the Congress to support an Army and maintain the Navy, and provide for the common defense and general welfare,

to conserve the man-power of the Nation, and increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy.

WHEN CONGRESS IS GIVEN AUTHORITY OVER A SUBJECT-MATTER, IT MAY ENACT LEGISLATION HAVING A REASONABLE RELATION TO THAT END.

The principle herein set forth is sustained in all of the cases both State and Federal. The United States Supreme Court, in the case of *Hoke* v. *State*, 227 U. S. 309, said:

> "Congress may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations."

In the case of *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, Justice Hughes, speaking for the Supreme Court, said:

> "It is also well established that when a State, exercising its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end, as it may deem necessary in order to make its action effective."
>
> *See also Champion* v. *Ames*, 188 U. S. 321.
>
> "Let the end be legitimate, let it be within the scope of the Constitution and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter or spirit of the Constitution are constitutional."

Based on the principles set forth in these and other cases, State and Federal courts have sustained laws prohibiting the sale of any alcoholic beverages, because

such prohibition had a reasonable relation to the end sought by the original prohibition.

> "In the case of *United States* v. *Cohn*, Court of Appeals of Indian Territory, 32 S. W. Rep. 38, the court had before it the duty of interpreting the Federal statute which forbade the sale within the territory of a non-intoxicating liquor known as Rochester tonic. * * * After quoting the statute at length, the court said: 'No one can carefully read this statute but that he will be impressed with the idea that Congress, whatever it omitted to do, intended to completely cover the whole case, and to erect and complete an impregnable barrier against the introduction, sale, and use of intoxicating liquor in all its of forms and to guard against all of the well-known subterfuges resorted to to deceive courts and juries in relation to the matter. * * * Congress evidently had some purpose in thus changing the ordinary and common use of language.' "

This power has frequently been used by the State and Federal Government to make effective legislation which has been legally acted. The following are a few of the many citations illustrating this principle, and showing the extent to which it has been sustained by the State and Federal courts:

> *Elder* v. *State*, 162 Ala. 41; *States* v. *George* (La.) 67 South 953; *Feibleman* v. *State*, 120 Ala. 122; *Dinkins* v. *State*, 149 Ala.; *Lambee* v. *State*, 151 Ala. 86; *Eaves' Case*, 113 Ga. 794, 39 S. E. 318; *O'Connell's Case*, 99 Me. 61, 58 Atlantic 59; *Pennell* v. *State*, 123 N. W. 115; *State* v. *Maine*, 36, citing; *Com.* v. *Blose*, 116 Mass. 36; *Com.* v. *Brelsford*, 136 Mass. 61; *Com.* v. *Piche*, 98 Maine 348; *Com.* v. *Show*, 133 Mass. 575; *State* v. *O'Connell*, 99 Maine, 61; *State* v. *Intoxicating Liquors*, 76 Iowa, 243; *State* v. *Guinan*,

66 Rhode Island 401; *Crane* v. *Campbell*, 245 U. S. 304; *State* v. *Walder*, 83 O. S. 68; *U. S.* v. *Doremus*, 249 U. S. 86.

DOES THE WAR PROHIBITION ACT HAVE A REASONABLE RELATION TO THE AUTHORITY GRANTED TO CONGRESS TO SUPPORT THE ARMY AND NAVY AND OTHER RECOGNIZED POWERS?

Congress clearly has the power to support the Army and maintain the Navy. What does this include? It clearly includes the obligation to supply them with food, clothing, ammunition, firearms, transportation, shelter, the best possible environment in the training camps, the establishment of policies of Government that will support that Army in field, in factory, on the farm, and with a great national spirit of patriotism that inspires the soldier to be at his best. This is not confined to material Army supplies. General Pershing, the Commander-in-Chief of our Armies in France, said: "From the military point of view, we can not tolerate alcohol among our soldiers. War is merciless; men must be competent. The drinking man makes a bad soldier. No matter how much Germany may believe in feeding up her men on alcohol in order to screw up their fighting courage to the sticking point. The Army won't stand alcohol, because it must conserve its man powe ."

LIQUORS WEAKEN "MAN POWER" IN THE ARMY AND IN CIVIL LIFE.

Public hearings relating on this bill, page 300, set forth the following:

"Alcohol and commercialized vice flourish together and generally die together.

"About 66,000 persons die in the United States directly from drink each year, but several times as many die from diseases of lungs, kidneys, or liver, etc., because these organs are weakened by 'moder ate' drinking. Also hundreds of thousands of ba bi e and children die from hereditary diseases and neglect due to drink.

"There were 600,000 men rejected from the first draft for physical defects. If the ratio had prevailed throughout the country as in Kansas, which has outlawed liquor 37 years, the rejections would have been only 120,000, or one-fifth as many.

"It is one great cause of accidents; in factories, mines, and other industries, truck and auto drives have access to it.

"The world over, more persons died of drink and its effects in 1917 than were men of England and France killed in battle. To appreciate this, look up the data obtained and published by British and American life insurance companies."

LIQUOR WASTES FOOD SUPPLIES.

It was brought to the attention of the committee, on page 299, that brewers used 64,000,000 pounds of sugar; that it was using enough grain to feed 7,000,000 people a year; that while the people were being appealed to by the Government to save food by the crumb, the brewers were wasting it by the ton. All the while the Government was placarding the whole nation with posters entitled "Food Will Win the War. Do Not Waste It!" Congress had clearly in mind the prohibition of food waste by prohibiting the manufacture and sale of beer and wine. This was essential to the best possible support of the Army and Navy.

LIQUOR WASTES FUEL

Needed for ships and transportation. On page 298 the following testimony was presented to the committee:

"The brewers of the country used in 1917 over 3,000,000 tons of coal.

"Anthracite coal mine operators estimate that the decreased production of anthracite alone by reason of alcoholic drinks is 7,500,000 tons per year, or about 11 per cent of the total production.

"If the same conditions prevail with bituminous, the lessened production of bituminous is 56,000,000 tons, the proportion of bituminous coal to anthracite being 7½ to 1.

"The total additional coal available, without employing one more man or investing one more dollar for plant, is over 66,000,000 tons; and your factory or business or home needs coal."

LIQUOR CRIPPLES TRANSPORTATION FACILITIES NEEDED FOR WAR ACTIVITIES.

On page 299 the committee which reported this measure had brought to its attention the following:

Transportation Required by Breweries.

	Tons.
Raw material, 3,000,000,000 pounds foodstuffs, equals	1,500,000
Require, coal	3,000,000
Product 60,000,000	9,000,000
Totals in teams and cars	13,500,000

All of which require hauling and over one-half of which require railroad transportation. This requires over 200,000 freight cars during the year, and uses several

hundred locomotives constantly, and increases freight congestion.

The shortage of labor due to drink is a big factor in the freight tie-up.

It is manifest from the above and other reasons that the prohibition both of the manufacture and sale of liquor has not only a reasonable but a vital relation to a support of the Army and of the Navy. When it is once conceded that it has some relation to a recognized authority, the court will not interfere with the exercise of this discretion.

As was said by the court in the case of *Purity Extract* v. *Lynch*, 226 U. S. 191:

> "With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it can not be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature—a notion foreign to our constitutional system."

AUTHORITY MAY BE CONFERRED UPON CONGRESS TO ENACT LEGISLATION BY A GROUP OF POWERS WHEN IT IS NOT CLEAR THAT SPECIFIC AUTHORITY IS CONFERRED BY ONE.

In 1870 the cases of *Knox* v. *Lee* and *Parker* v. *Davis* (12 Wall., 457), involving the same question, were argued at the court and are known as the Legal Tender cases. The court said:

> "It is not indispensable to the existence of any power claimed for the Federal Government that it can

be found specified in the words of the Consitution, or clearly and directly traceable to some one of the substantive powers expressly defined, or from all of them combined. It is allowable to group together a number of them and infer from them all that the power claimed has been conferred. Such a treatment of the Constitution is recognized by its own provisions."

Justice Bradley, in delivering a concurring opinion, said:

"It is absolutely essential to independent national existence that Government should have a firm hold on the two great sovereign instrumentalities of the sword and the purse, and the right to wield them without restriction on occasions of national peril. In certain emergencies Government must have at its command not only the personal services—the bodies and lives—of its citizens, but the lesser, though not less essential power of absolute control over the resources of the country. Its material of war, its munitions, equipment, and commissary stores must come from the industry of the country."

This decision reversed the decision of the court in *Hepburn* v. *Griswold* and adopted the dissenting opinion of Mr. Justice Miller in that case as the law. It was a plain, unequivocal, unambiguous declaration that Congress had passed these acts strictly as a necessity of war; that whether the power was an express one or an implied one really made no difference. The life of the Government was in jeopardy, and the doctrine of self-preservation was resorted to to maintain it. It is true that Justice Bradley, in his concurring opinion in the last cases, said that he "did not put this exercise by Congress as a war power, for other emergencies might arise even in time of peace when it would be necessary for Congress to exercise such power,"

yet he concurred in the opinion of Mr. Justice Miller and that of Mr. Justice Strong that, as the exercise of a war power, it was entirely within the power of Congress to pass the acts in question.

POWER TO MAKE CONSTITUTIONAL PROVISIONS EFFECTIVE.

Article 1, Section 8, gives power to Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or any Department or office thereof." This provision of the Constitution has been criticised most severely. It is the clause which gives life and vitality to the Constitution. A more complete endowment of constitutional authority could scarcely have been made. Alexander Hamilton said: "It has been the source of much virulent, invective, and petulent declamation." Mr. Madison said: "Few parts of the Constitution have been assailed with more intemperance than this." The evident meaning of the language is that Congress shall have the authority to enact any law which may be necessary and proper in order that the powers which the Constitution has may be executed. The courts in the cases cited have construed this clause to mean that any or all of the powers designated in the Constitution may be made effective by the acts of Congress, and as the court said, *supra*, "It is not indispensable to the existence of any power claimed for the Federal Government that it can be found specified in the words of the Constitution or clearly and directly traceable to some one of the substantive powers." It is manifest from the construction

placed upon the whole Constitution by the court that in times of national peril and war emergencies Congress is authorized to enact legislation which will safeguard the nation. This has been done in numerous instances cited. The power of the Congress as set forth in the Constitution to declare war—to raise and support armies, to provide and maintain the navy—to make rules for the Government and regulations for the land and naval forces—to provide for the organizing, arming, and disciplining the militia and to provide for the common defense and general welfare are sufficient authority taken collectively if not separately for this legislation.

We respectfully submit that the authority for this act is clear and definite under the provision pointed out in Section 8, Article 1. But this theory is further strengthened by the principle set forth in the cases above mentioned. Congress repeatedly enacted laws to provide for the common defense and the general welfare—the Espionage Act, the Conscription Act, and many of the provisions relating to alien-enemy property and to alien enemies within our border. These laws have been sustained not because there is a specific provision in the Constitution authorizing them, but because they have a reasonable relation to some or all of the powers conferred upon Congress by the Constitution.

WAR EMERGENCY.

The acts above mentioned have been sustained because of the war emergency, which confronted the nation. The Government has always taken the position that when its existence was at stake and the national life jeopardized, Congress could exercise powers which were dormant in times of peace. Senator Knox stated the proposition con-

cisely. It was called to the attention of the committee on page 106, as follows:

> "The war powers of the Constitution, in my opinion, are dormant until the status of war is declared by Congress, and then they may be exercised without limitation or qualification, to the extent that the safety of the nation demands. Of this Congress is the judge, except as the Commander in-Chief of the Army and Navy in the actual conduct of the war and in the case of great emergency or dire necessity may be compelled to act."

Willoughby on the Constitution, p. 715, says:

> "The constitutional power given to the United States to declare and wage war, whether foreign or civil, carries with it the authority to use all means calculated to weaken the enemy and to bring the struggle to a successful conclusion. When dealing with the enemy all acts that are calculated to advance this end are legal. Indeed, the President, in the exercise simply of his authority as Commander-in-Chief of the Army and Navy, may, unless prohibited by Congressional statute, commit or authorize acts not warranted by commonly received principles of international law; and Congress may by law authorize measures which the courts must recognize as valid, even though they provide penalties not supported by the general usage of nations in the conduct of war. Thus, during the Civil War, in certain cases the provision by congressional statute for the confiscation of certain enemy property or land was enforced, though such confiscation was not in accordance with the general usage of foreign states.
>
> "Even in dealing with its own loyal subjects the power to wage war enables the Government to override in many particulars rights which in time of peace are inviolable."

The court said in the case of *Parker* v. *Davis*, 12 Wall. 457:

> "I do not say that it is a war power, or that it is only to be called into exercise in time of war; for other public exigencies may arise in the history of a nation which may make it expedient and imperative to exercise it. But of the occasions when, and of the times how long, it shall be exercised and in force, it is for the Legislative Department of the Government to judge."

Congress faced an emergency both with reference to the Army and to those who were to furnish the food, fuel, munitions, and man-power to support the Army. They had before them the statements of the Secretary of the Navy, hereinbefore mentioned, and of the great leaders of most of other great armies, as follows:

Earl Roberts said:

> "Thirteen thousand abstainers are equal to 15,000 non-abstainers. Give me a teetotal army and I will lead it anywhere."

Sir John French says:

> "Abstinence and self-control make a man more serviceable. If men want to see regiments, battalions, squadrons, and batteries, smart and efficient, if they have at heart the fame of the glorious regiment to which they belong, they must practice these great qualities of self-control and self-sacrifice."

Methuen says:

> "I appeal to these gallant men who represent this great empire to act their part as England expects them to do; and throw away from them the vile curse of drink, so that they may make themselves fit in body and nerve to face a foe that is as courageous as he is brutal in war."

Lieut. Gen. Sir Reginald Hart says:

> "As an officer, I support temperance because I know that officers and men who avoid drink are physically and mentally efficient, their nerves are stronger, they march better, there is far less sickness and crime, and their power of resistance is strengthened."

Admiral Sir J. R. Jellico says:

> "As regards straight shooting, it is everyone's experience that abstinence is necessary for efficiency. By careful and prolonged tests, the shooting efficiency of the men was proven to be 30 per cent worse after the rum ration than before."

In the light of all the facts and testimony which were placed before Congress and the nation when this legislation was enacted, it is difficult to reach a conclusion that the liquor traffic was not subject to the legislative power in question. The nation had reached a great crisis. The people were called upon to deny themselves not only luxuries but to limit to the utmost even the comforts and the necessities of life. Sugar, wheat, flour and other articles ordinarily used without restrictions were placed under Government control. The Government proceeded on the theory pronounced by Justice Bradley, when he said that the Government in a crisis may demand both the resources and lives of the people. This is what was actually done by the Government in this last war, when about four million men were called into the Army to sacrifice life itself if need be, to save this country, and help save the world from autocracy and its evil results. In such a crisis, the Government properly concluded that non-essentials should be eliminated first. The liquor traffic

was not only a non-essential, but it was a positive menace to the country.

This court years ago characterized the liquor traffic as "a source of crime and misery to society." Such a traffic was properly prohibited by Congress in its effort to keep the Army and Navy at their best, and to remove from the people an evil which decreased production and efficiency, and increased crime, disorder, and waste.

Congress acted within the authority imposed upon it to enact legislation to meet the crisis which was before them, and which continues until the war has actually ended and the demobilization of the Army terminated.

DOES WAR PROHIBITION VIOLATE THE FIFTH AMENDMENT TO THE CONSTITUTION?

Appellee claims that the War Prohibition Act violates the Fifth Amendment, because it takes his property for public use without just compensation. It has been uniformly held by the courts that the liquor traffic is not entitled to compensation when it is prohibited by a law enacted by a recognized authority. The Government may prohibit the traffic entirely, or do less than enact total prohibition if it so desires. In other words, the plenary power to prohibit includes the lesser power to prohibit in part or conditionally. See *Lloyd* v. *Dollison*, 194 U. S. 445; *Rippey* v. *Texas*, 193 U. S. 504; *American Express* v. *Beer*, 65 Southern 581; *State* v. *U. S. Express Co.*, 145 N. W. 450; *State* v. *Doe*, 139 Pacific, Rep. 1170.

Congress had plenary power to prohibit the beverage traffic entirely. It did not prevent the appellee from withdrawing his liquor under the provisions of this act, for export or non-beverage purposes. Congress

could have gone farther than it did. The failure of Congress to use its entire power furnishes no basis for a complaint by the appellee. Compensation in either instance is not recognized by the law.

The outstanding case on this question was decided years ago by the United States Supreme Court in *Mugler* v. *Kansas* (123 U. S. 623). December 5, 1887, the United States Supreme Court decided: 'The power which States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public is not, and—consistently with the safety of organized society—can not be burdened with the condition that the State must compensate such individual owners for pecuniary losses they sustained by reason of their not being permitted by noxious use of their property to inflict injury upon the community.' " (123 U.S., p. 623, Kansas cases.)

The Kansas cases were submitted to the court upon the following agreed statement of facts: First, That said buildings were erected by them prior to the adoption by the people of Kansas of the constitutional amendment prohibiting the manufacture and sale of intoxicating liquors for other than medicinal, scientific, and mechanical purposes, and before the passage of the prohibitory liquor statute of that State.

Second. That the buildings were erected for the purpose of manufacturing beer and can not be put to any other use, and if not used they will be of little value.

In the light of this decision every liquor dealer who has engaged in the liquor business for the last 30 years has done so with full notice that he has no legal claim for compensation. This decision has been followed by every

State supreme court, and has been reaffirmed many times by the United States Supreme Court.

If the State under its police power may prohibit intoxicating liquors without compensation, then the Federal Government under the above constitutional provisions in maintaining and protecting her Army and Navy in a war emergency certainly has powers as broad. And if the Government has the greater power of entirely destroying the use of property without compensation, it certainly has the lesser power of providing by law that the sale of such liquors shall only be permitted for certain, specified, legitimate purposes.

DOES THE EIGHTEENTH AMENDMENT PERMIT THE MANUFACTURE AND SALE OF LIQUOR FOR ONE YEAR AFTER RATIFICATION?

The appellee urges that the 18th amendment permits the manufacture and sale of liquor for one year from date of ratification or from January 16, 1920. Section (1) of Article 18 provides:

> "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

There is nothing in this provision which gives a guarantee to the liquor traffic that it can continue during the interim of one year, if the traffic is prohibited by some other unit of government or by some other legislative authority. This provision of the Constitution and code

enacted to make it operative does not take effect until January 16, 1920. The only guarantee that Article 18 carries for the liquor traffic is that the article in question will not become operative until the date mentioned. If the logic of the appellee is sound then those villages, township, cities, counties, and States that have voted dry since January 16, 1919, have exceeded their authority and those laws would be void. Many States adopted constitutional prohibition and it did not become operative for one year or more after its adoption. In the interim subdivisions of the State would vote dry under local-option laws or municipal councils would prohibit the traffic by ordinances. This principle of legislation has been uniformly sustained through the years. In other words, where one unit of government adopts prohibition to go into effect at a fixed time it does not prevent other units of that government from prohibiting the traffic at an earlier period nor does it prohibit the legislative department of the same unit of government from acting at an earlier period if there is no special or definite guarantee against the other units of government from acting upon the subject-matter under their former recognized authority.

A resolution to submit the Amendment was introduced in 1916. One partial War Prohibition Act was adopted in 1917, before the resolution to submit the Amendment was passed. Congress was cognizant of its power to enact temporary War Prohibition, as well as its power to submit permanent Prohibition. There is nothing in the 18th amendment or in the records which show that Congress ever contemplated denying other legislative authorities from acting within the scope of their existing

power. If Congress had intended to prevent all the village, city, county, State, and Federal authorities from acting under the authority they then possessed, or intended to repeal their power to act, it would have been written into the proposed amendment. A suggestion of that kind would have received scant support by Congress that favors prohibition legislation by a very large majority. Repeals by implication are not looked upon with favor. (*Harrington* v. *U. S.*, 11 Wall 356; *U. S.* v. *Lenois*, 17 How. 85.)

To claim that these other legislative agencies have no right to function because a constitutional provision prohibiting the liquor traffic goes into effect a year later is ingenious but is contrary to every consideration of sound public policy. The beverage liquor traffic in the nation will be prohibited by the 18th amendment and the Federal Prohibition Code, January 16, 1920. It could have been prohibited by local or State action the day after the 18th amendment was ratified. If this is correct, then the 18th amendment gives no such constitutional guarantee of extended life as claimed by the appellee. Prohibition has been put into effect by many units of government since January 16, 1919, and no objection has been made to it by the courts. If this can be done legally, then Congress can use its war powers to meet an emergency in the interest of the nation's welfare. Even a license gives the traffic no property or vested right.

It is at best a temporary permit which may be revoked at any time. *Stone* v. *Mississippi*, 101 U. S. 814; *Kresser* v. *Lyman*, 74 Fed. 765; *Moore* v. *Indianapolis*, 120 Ind. 483, 22 N. E. 424; U. S. R. S., Sec. 3243. The payment

of the U. S. liquor tax not only gives no right to a liquor dealer to continue in the trade, but it is used as evidence against him when he sells in violation of law.

To claim immunity from other prohibition laws because the Constitution does not prohibit the trade until 1920, is like claiming immunity from arrest and conviction for counterfeiting in a State because a national law against counterfeiting does not take effect for a year. The traffic has always been in a class by itself to the treatment of which there is no analogy in the law, even in times of peace. It never has had special privileges.

This court recently said in the case of *The James Clark Distilling Company* v. *The Western Maryland Railway Company*, 242 U. S. 311:

> "The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guarantees of the Constitution but for the enlarged right possessed by government to regulate liquor, has never, that we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which under the constitutional guarantees such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace."

United States District Judge Carpenter on November 17, in deciding this point, said:

> "Congress had the power before the 18th amendment was passed to make police regulations in the aid of war. This amendment certainly did not destroy

that right. If that amendment had been passed in January, 1917, with the one year of grace for the liquor interests to readjust themselves and their business, could anyone in reason contend that Congress had not the power in April, 1917, to prohibit the manufacture, sale, or even use of ardent spirits?"

The liquor traffic never has had any "inherent right to exist" in a State or in the nation. It is here by sufferance only. It has always been treated more as a trespasser than as an invited guest. To claim that guarantees have been extended to it by implication may be novel, but we do not believe it has any claim on the court. It is not based on reason, precedent, or justice.

IS THERE AUTHORITY FOR THIS ACT TO CONTINUE IN EFFECT DURING THE PERIOD OF DEMOBILIZATION?

The obligation on the part of Congress to support the Army by conserving man-power, food, fuel, etc., is not limited to the actual time of war. The power of Congress to support the Army continues until the time that the Army is actually demobilized. The necessity for conserving the food and the fuel and the man-power is practically as great during that period as during the period of actual war. It represents one of the most trying periods of national existence to supply food and other materials for the Army and for those who are supporting it during the transition. If Congress has the power, as it clearly has, to furnish that Army with food, shelter, clothing, fuel, and transportation until the Army is demobilized, then the War Prohibition Act which conserves those things which are essential to the support of the Army and Navy is clearly constitutional.

The war has not terminated until the peace treaty is signed. His Honor, Judge Learned Hand, in a very able and convincing opinion in the case of the *Commercial Cable Company* v. *Burleson*, held:

> "It is a treaty which terminates the war (The Protector, 12 Wall 700; *Hijos* v. *United States*, 194 U. S. 315). An armistice effects nothing but a suspension of hostilities; the war still continues. It is true that a war may end by the cessation of hostilities or by subjugation, but that is not the normal course, and neither had hostilities ceased nor had the enemy been subjugated in the sense in which that term is used. There were still military operations; the armistice has not been carried out, and after it was, armed forces of the United States were in occupation of enemy territory, and were in European and Asiatic Russia, where, indeed, they still remain."

In deciding another case, *Scatena* v. *Caffey*, Judge Augustus Hand sustained the constitutionality of the War Prohibition Act during the period of demobilization, said:

> "I think the valid exercise of the war power depends not merely upon whether the means employed is adapted to aid in the immediate prosecution of the war, but also whether it can be said to have any substantial relation to conditions immediately growing out of the termination of hostilities. So long as the treaty of peace is not ratified there is some chance of the resumption of hostilities, though I place but the slightest weight upon this. A war emergency, however, of serious import arises in respect to the period of demobilization. During that period there has been and still is a stream of enlisted men coming into and remaining within the United States. The great stimulus engendered by the popu-

lar excitement which attended the war and by their expectation of having to combat their country's foes has disappeared and a more or less purposeless and dull routine has followed as the inevitable lot of the young soldiers. Under such circumstances men are especially subject to all the temptations which a lack of immediate definite purpose, as well as a certain relaxation of discipline, are likely to entail. During the same period the country has been filled with other men but recently discharged from military service, a considerable number of whom are said in the moving papers before me to lack employment. There is, besides all this, the general restlessness which has apparently always followed the termination of a great war. Under such circumstances it can strongly be argued that the free use of stimulants may have peculiar dangers to the community. At all events, I do not see how it can be fairly said that no emergency exists directly growing out of the war, or that such emergency may not be affected by such a thing as the liquor traffic.

* * * * * * *

"I think it plain from the terms of the act that Congress had among its objects the regulation of the liquor traffic during the period of demobilization. That was a critical period; more critical in some respects than that of active hostilities. If Congress thought that drastic prohibition during a period when there would probably be considerable lack of employment and restlessness would be advantageous, it was within the war power, in my opinion, for it to adopt legislation which would care for these conditions arising so immediately out of the war itself."

From every view point the necessity arising out of the war for prohibiting the beverage liquor traffic during demobilization is apparent.

The aftermath of every war has witnessed unrest and disorder. It is more intense after this war because of the magnitude and length of the conflict. As long as there is a necessity for saving food, fuel transportation, and conserving man-power as a result of this war, the act in question is a proper use of the war power. To have fifty million gallons of whiskey forced on the market during this time of unrest, disorder, and occasional mob violence would be a crime against civilization and orderly government. We believe that a proper construction of the law will prevent this and avert a great calamity in the nation.

THE PRESUMPTION OF CONSTITUTIONALITY.

Unless there is such conflict between the law and the Constitution that can not be reconciled, it should be sustained.

In *United States* v. *Harris*, 106 U. S. 635, 27 L. Ed. 290, Mr. Justice Woods, speaking for the court, said:

> "Proper respect for co-ordinate branch of the Government requires the courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated."

In *A. T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 43 L. Ed. 909, Mr. Justice McKenna said:

> "It is also a maximum of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it transcended its powers."

In *Brown* v. *Walker*, 161 U. S. 590; 40 L. Ed. 819, Justice Brown, speaking for the court, says:

> "That the statute can be upheld, if it can be construed in harmony with the fundamental law, will be admitted. Instead of seeking for excuses for holding acts of the legislative power to be void by reason of their conflict with the Constitution, or with certain supported fundamental principles of civil liberty, the effort should be to reconcile them if possible, and not hold the law invalid unless, as was observed by Mr. Chief Justice Marshall in *Fletcher* v. *Peck*, 10 U. S. 88, 3 L. Ed. 162, the 'opposition between the Constitution and the law be such that the judge feels a clear and strong conviction of their incompatibility with each other.' "

The War Prohibition Act was adopted by Congress in response to the overwhelming sentiment of the nation in favor of preventing the waste of food, fuel, transportation facilities, and man-power caused by the liquor traffic. Congress believed that it was well within its power with all the evidence it had before it to adopt this important legislation. If the act, therefore, is in reasonable relation to any recognized war power of Congress, it is valid. Whether it is a wise act or not should not enter into the construction or the determination of the validity of the measure. Congress had not only the authority, but the obligation to support the Army and the Navy in every way possible. The Government appealed to all to save food and win the war. Patriots responded, and saved food by the crumb, while the brewers wasted it by the ton. Manufacturers could not secure cars to send their products to purchasers, but the liquor dealers used thousands of refrigerator cars which were needed to carry essential food products.

The coal supply was short. Factories, churches, and other buildings were closed for lack of coal, while dealers worked overtime and used large quantities of fuel needed in more essential industries. Field, factory, and farm were appealing for help while they boasted of the hundreds of thousands whom they employed in this non-essential industry. Evidence accumulated from every quarter that the man-power of the nation was made less efficient and was crippled by liquor. Congress faced this situation and decided that this nonessential industry should be prohibited as a war measure until demobilization was completed and normal peace conditions were established. The date of operation of the War Prohibition Act prohibiting the sale of liquors was fixed months ahead in order to give liquor dealers an opportunity to adjust their business relations. See Congressional Record, Sixty-fifth Congress, Aug. 28, 1919, No. 200, page 10475. The fact that Congress did not prohibit entirely the manufacture and sale earlier does not present any reason or argument against the validity of the act. The power of Congress to support the Army and the Navy is complete until the war ceases and the Army is demobilized. This act having a reasonable relation to that power and other war powers, we respectfully submit it should be sustained.

Respectfully submitted.

WAYNE B. WHEELER,
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Attorneys, Amici Curiæ.

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WAR-TIME PROHIBITION CASE.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 398. 589.

ELWOOD HAMILTON, Collector of Internal Revenue,
Appellant,

vs.

KENTUCKY DISTILLERIES AND WAREHOUSE CO.
Appellee.

Appeal from the District Court of the United States for the Western District of Kentucky.

BRIEF FOR APPELLEE

In support of the contention that the War-Time Prohibition section of the Act of November 21, 1918, is unconstitutional as regards pre-existing liquor because in violation of the Fifth Amendment and has ceased to be operative.

LEVY MAYER,
WM. MARSHALL BULLITT,
Counsel for Appellee.

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WAR-TIME PROHIBITION CASE.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

ELWOOD HAMILTON, COLLECTOR, ETC.,
Appellant,

vs.

KENTUCKY DISTILLERIES & WAREHOUSE CO.,
Appellee.

Appeal from the District Court of the United States for the Western District of Kentucky.

BRIEF FOR APPELLEE.

This appeal involves only two questions (1) the constitutionality, under the "just compensation" clause of the FIFTH AMENDMENT, of so much of the Agricultural Act of November 21, 1918 (herein called the War Prohibition Act), as prohibits the sale of pre-existing stocks of whisky, or its removal from bond, after June 30, 1919, and (2) whether that act has, by its own terms, ceased to be operative

by reason of "the conclusion of the present war" and "the termination of demobilization."

By the War Prohibition Act of November 21, 1918 (introduced on May 6, 1918, at the very crisis of the War, but not adopted for more than six months, nor until ten days after the armistice) it was provided that

> "for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food and clothing for the Army and Navy"

it shall be unlawful, after June 30, 1919, to sell, or to withdraw from bond, any whisky

> "until the conclusion of the present war and *thereafter* until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States."*

The Kentucky Distilleries & Warehouse Company (herein called Kentucky Co.), has, for more than four years, owned very large amounts of whisky, which to present the questions in this case, may be described as follows (Rec., 5-7):

1. More than 15,000 gallons of whisky, on

*The statutory prohibition is confined to "beverage purposes" which will be assumed as implied in all our discussions.

which the company has heretofore paid the tax of $6.40 a gallon ($102,169.60); of which $3.20 a gallon (more than $50,000) it was compelled to pay as late as September 24, 1919, under the increased tax law of February 24, 1919. This whisky is called "floor stock" and is in the company's possession. The Kentucky Co. and its branches were compelled to pay as increased taxes to the Government, since February 24, 1919, under the Revenue Act of that date $993,630.12. (Rec., 7.)

2. 22,157 barrels, containing more than 1,091,000 gallons and costing more than $1,000,000 (of which about 18,000 barrels are in bonded warehouses in Kentucky), upon which the Internal Revenue tax has not yet been paid.*

On October 10, 1919, the Kentucky Co. tendered to the Collector of Internal Revenue the sum of $132,331.52, being the tax upon 534 barrels of the whisky last above described, and sought to withdraw it from bond, in order to sell the same in the United States for beverage purposes. (Rec., 8, 20-21.)

The Collector refused to accept the money

*In addition to its own holdings, the Kentucky Co. has in its warehouses 215,846 barrels of whisky (containing over 10,000,000 gallons) costing far in excess of $5,000,000, belonging to thousands of customers, banks, etc., for which its negotiable warehouse receipts are outstanding. All of this whisky was made several years before the war and will be a complete loss to its owners if the War Prohibition Act is sustained. The Kentucky Co. has given to the U. S. over $10,000,000 of warehouse bonds to secure the payment of the revenue tax, all of which bonds are now in force. (Rec., 7, 9, 10.)

or to permit the withdrawal of the whisky from bond. (Rec., 21.)

Thereupon, the Kentucky Co. filed this suit to compel the Collector to accept payment of the tax and to permit the withdrawal of the whisky from bond, upon the ground that the War Prohibition Act of November 21, 1918 (under which the Collector assumed to justify his refusal) is (*a*) unconstitutional in that it violates the FIFTH AMENDMENT by taking the company's private property for public use without making any provision for just compensation therefor, and (*b*) inoperative as both the war and demobilization have terminated. (Rec., 1-24.)

The Government's motion to dismiss the bill was overruled and a final decree was rendered in favor of the plaintiff (Rec., 26); to review which this appeal was taken.* (Rec., 28-29.)

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*The italics used in the quotations from the decisions of the courts are our own.

SUMMARY OF POINTS DISCUSSED.

1. **Congress has no power to prohibit the sale of whisky within a State, except under its war powers (this page, infra).**

2. **The War-Time Prohibition Act is unconstitutional because it violates the Fifth Amendment, in that it takes pre-existing private property for public use without compensation. (p. 18, infra.)**

3. **The War-Time Prohibition Act has, by its own terms, ceased to be operative. (p. 48, infra.)**

FIRST POINT.

Congress has no power to prohibit the sale of whisky within a State, except under its War Powers.

The Constitution contains no grant of power, express or implied, by which Congress can ordinarily either prohibit, or authorize, the sale of liquor within a state. This was recognized by the fact that it was necessary to adopt the EIGHTEENTH AMENDMENT in order to establish prohibition within the states, which Congress was previously powerless to accomplish.*

*Of course Congress can control the sale of liquor in certain exceptional cases such as on Government premises, Indian reservations, etc.

It has been repeatedly held that, by virtue of the TENTH AMENDMENT, as well as by the whole scheme of the Federal Government as one of enumerated powers, Congress has no police power by which it can (1) abolish the liquor traffic within a State or (2) otherwise control matters of purely internal concern, because

I. *By the Tenth Amendment the States reserved to themselves the police power over the liquor traffic with the right to abolish its future manufacture, sale or possession.*

The TENTH AMENDMENT provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

It has been repeatedly held that the states have reserved unto themselves the entire police power over the liquor traffic.

(*a*) *The States' police power over the liquor traffic is absolute and exclusive.* Notwithstanding the fact that the Federal Government has raised a large portion of its revenue, amounting to hundreds of millions of dollars annually, by taxing intoxicating liquors, the States, under their reserved powers, have the

right absolutely to prohibit the manufacture or sale of liquor within their respective limits and thus withdraw an enormous source of revenue from the Federal Government.

Prior to the adoption of the FOURTEENTH AMENDMENT, the regulation, or the total prohibition, of the liquor traffic was admittedly within the police power of the States, subject to no limitations whatever, except those imposed by the State Constitutions, or by the general principles supposed to limit all legislative power. (*Bartemeyer* v. *Iowa,* 18 Wall., 129, 132.)

The FOURTEENTH AMENDMENT made no change in the law in that respect. In a long series of cases, of which *Bartemeyer* v. *Iowa,* 18 Wall., 129, *Beer Co.* v. *Massachusetts,* 97 U. S., 25, *Mugler* v. *Kansas,* 123 U. S., 623, and *Kidd* v. *Pearson,* 128 U. S., 1, are conspicuous examples, this Court has upheld the absolute power of the States to prohibit (*a*) the *future* manufacture of liquor (even for one's personal use), (*b*) the sale of liquor acquired *after* the passage of the act, or (*c*) the *use* of property for either of such purposes.

In *Crowley* v. *Christensen*, 137 U. S., 86, *Purity Extract Co.* v. *Lynch*, 226 U. S., 192 *Eberle* v. *Michigan*, 232 U. S., 700, *Crane* v. *Campbell*, 245 U. S., 304, and *Barbour* v. *Georgia*, 249 U. S., 454, it was held that on account of the evils shown by experience to be consequent upon the use of liquor, a State has the power to regulate, or absolutely to prohibit, the manufacture, gift, purchase, sale, transportation, or even mere possession of liquors for personal use, within its borders; and that in the exercise of such power the State might adopt such measures as were reasonably appropriate to render the exercise of the power effective, including the right to prohibit the sale of nonintoxicating liquors (innocuous in themselves) on account of the artifices used in selling intoxicants under the guise of innocent beverages.

The foregoing cases establish the unlimited power of the states with respect to the liquor traffic within their borders.*

(*b*) *The depreciation of brewery or distillery properties as an incident to prohibition.*

*Subject only to the possible qualification as to liquor actually in existence *before* the prohibitory legislation was passed. (See page 10, *infra*.)

If, as the result of the States' power to abolish the manufacture and sale of liquor, existing breweries or distilleries (bought or built at a time when the manufacture of liquor was perfectly lawful) are reduced in value, the owners thereof are not entitled to any compensation therefor, nor is such prohibitory legislation in violation of the "due process" clause of the FOURTEENTH AMENDMENT.

This is because (1) the FOURTEENTH AMENDMENT was never intended to impose restrictions upon the reserved powers of the States to protect their citizens; (2) the owners could continue to use the property for lawful purposes but were only forbidden to use it for purposes prejudicial to the public interest; and (3) although the plants were acquired at a time when the manufacture of liquor was permitted, the State did not thereby agree that its legislation on the subject of liquor would remain unchanged, but the brewers and distillers made their investments with full knowledge of the fact that the State might, in the future, declare such use of the property unlawful, and, if so, there was no deprivation or taking of property within the meaning of the FOURTEENTH AMENDMENT. (See *Mugler* v. *Kansas*, 123 U.

S., 623, *Murphy* v. *California,* 225 U. S., 623, *Eberle* v. *Michigan,* 232 U. S., 700, 707.)

(*c*) *The States' power with respect to pre-existing liquor.* It is still an open question whether a State can make unlawful the possession, use or sale of liquors lawfully acquired (as in the present case) *before* the passage of the prohibitory statute.

This Court has, in *Bartemeyer* v. *Iowa,* 18 Wall., 129, *Beer Co.* v. *Massachusetts,* 97 U. S., 25, *Eberle* v. *Michigan,* 232 U. S., 700, 706, and *Barbour* v. *Georgia,* 249 U. S., 454, 459, expressly reserved for decision the question (when it should actually arise) whether, even under the police power, a State can pass a prohibition law which will make unlawful the possession, use or sale of liquor lawfully acquired *before* the passage of such law. It is still an open question whether it is "due process" of law for a State, having once allowed a person to acquire property by the investment of money therein, to make the further possession or sale of such liquors unlawful, upon the ground that the preservation of general public morals and safety so requires. It can of course do so if it makes just compensation for the property so taken.

The leading State Court case upon this subject is that of *Wynehamer* v. *People,* 13 N. Y. 378, decided in 1856, where the court in an exhaustive opinion held that the Act passed April 9, 1855 by the legislature of New York, which prohibited the sale of intoxicating liquors owned and possessed by persons within the State of New York at the time the act took effect, was unconstitutional because it violated the provision of the New York constitution which declared that no person shall be deprived of life, liberty or property without due process of law. The reasoning of the court on principle would seem unanswerable.

The distinction between the depreciation of plants and the question so reserved, is that while a man has *no* vested right to *use* his property in a *particular occupation* declared by the police power to be thereafter harmful to the community, nevertheless he *does have a vested right in the property itself;* and if the State makes unlawful the possession, use or sale of such property, it constitutes a taking thereof.

In the language of the court, in the Wynehamer case, *supra,* at page 387:

"It must follow that any scheme of legisla-

> tion which, aiming at the destruction of this use, makes the keeping or sale of them as a beverage, in any quantity and by any person, a criminal offense—which declared them a public nuisance—which subjects them to seizure and physical destruction, and denies a legal remedy if they are taken by lawless force or robbery, must be deemed, in every beneficial sense, to deprive the owner of the enjoyment of his property."

From this reference to the leading decided cases, it is clear that the States reserved to themselves the power to control, within their limits, the manufacture, sale, and possession of intoxicating liquors; that all of the prohibitory legislation heretofore considered by this Court, has been that of States acting under the powers reserved by the TENTH AMENDMENT; and that these cases do not authorize Congress to act in the matter, except that Congress can waive the interstate character of liquor in order to subject it to the laws of a state when once introduced therein, or can prohibit its transportation to a state where its possession is prohibited. (*In re Rahrer,* 140 U. S., 545; *Clark Distilling Co.* v. *West'n Md. Ry. Co.,* 242 U. S., 311, 323, and cases there cited.)

II. *Congress has no power, in peace time, to prohibit the sale of whisky.*

As a corollary to the proposition that the States have reserved to themselves the power over the liquor traffic within their borders, it follows that Congress has no such power. As was aptly said in *In re Rahrer,* 140 U. S., 545, 554, with respect to this very power of prohibiting the sale of liquor:

> "The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States, *not surrendered by them to the general government* nor directly restrained by the Constitution of the United States, and *essentially exclusive.* • • •
>
> In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual States, *and cannot be assumed by the National Government,* and that in this respect it is not interfered with by the Fourteenth Amendment. *Barbier* v. *Connolly,* 113 U. S., 27, 31."

To the same effect see *Fertilizing Co.* v. *Hyde Park,* 97 U. S., 659, 667.

In *Matter of Heff,* 197 U. S., 488, 505, it was held that, notwithstanding the United

States' wardship over Indians and the consequent unlimited right to legislate for their protection from liquor, when once an Indian became a citizen of the United States (as under certain conditions he might become), Congress lost the power to legislate as to him with respect to the use of liquor in a state and that an Act of Congress prohibiting sales of liquor to Indians did not apply to an Indian who had become a citizen of some state.

Mr. Justice BREWER said:

> "The general police power is reserved to the States, subject, however, to the limitation that in its exercise the State may not trespass upon the rights and powers vested in the General Government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. And so far as it is an exercise of the police power *it is within the domain of State jurisdiction.* * * *
>
> It will not be doubted that an act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a State to another within the territorial limits of that State *would be an invasion of the State's jurisdiction* and could not be sustained, and it would be immaterial what the antecedent status of either buyer or seller was. There is in these police matters *no such thing as a divided sovereignty.* Jurisdiction

is vested entirely in either the State or the Nation and *not divided between the two.*"

In *Hammer* v. *Dagenhart,* 247 U. S., 251, 273-276, in holding the Federal Child Labor Law unconstitutional, this Court said:

"The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and *not* to give it authority to control the States in their exercise of the police power *over local trade* and manufacture.

The grant of authority over a purely Federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution. * * *

The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters entrusted to the Nation by the Federal Constitution.

In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. *Lane County* v. *Oregon,* 7 Wall. 71, 76. The power of the States *to regulate their purely internal affairs* by such laws as seem wise to the local authority is inherent and *has never been sur-*

rendered to the general government. New York v. *Miln,* 11 Pet. 102, 139; *Slaughter House Cases,* 16 Wall. 36, 63; *Kidd* v. *Pearson, supra.* * * *"

In *Keller* v. *United States,* 213 U. S., 138, 144, 148, an Act of Congress making it a felony to harbor an alien prostitute within three years after entry into the United States, was held unconstitutional as a regulation of a matter within the police power reserved to the States, and not within any power delegated to Congress.

The Court said:

"While the keeping of a house of ill fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress, or is reserved to the State. Jurisdiction over such an offense comes within the accepted definition of the police power. Speaking generally, *that power is reserved to the States,* for there is in the Constitution *no grant thereof to Congress.* * * *

That there is a moral consideration in the special facts of this case, that the act charged is within the scope of the police power, is immaterial, for, as stated, there is in the Constitution *no grant to Congress of the police power.*"

Therefore, it necessarily follows that the War Prohibition Act of November 21, 1918, cannot, in the slightest degree, be sustained by

reference to any supposed congressional power, in peace time, over the liquor traffic.

III. *Under the war power, Congress had the right, temporarily to regulate and suppress the sale of liquor.*

By the Constitution, Art. 1, Sec. 8, it is provided that:

> "The Congress shall have power * * * to declare War. * * * To raise and support Armies. * * * To make rules for the government and regulation of the land and naval forces. * * * To make all Laws which shall be necessary and proper, for carrying into execution the foregoing Powers. * * *"

In order to guard and promote the health, welfare and efficiency of the men composing the army and navy, and to increase the efficiency of the workers in the production of arms, munitions, ships, food and clothing for them, Congress has the right temporarily to regulate the sale of liquor, and, if reasonably necessary to accomplish such objects, to forbid its sale. (*McKinley* v. *U. S.*, 249 U. S., 397, 399; *Selective Draft Law Cases*, 245 U. S., 366; *Schenck* v. *U. S.*, 249 U. S., 47, 52.)*

*The extent of the war power is illustrated in the following cases: *Grancourt* v. *U. S.*, 258 Fed., 25; *U. S.* v. *Casey*, 247 Fed., 362; *Pappens* v. *U. S.*, 252 Fed., 55.

No one will seriously dispute the power of Congress to suppress houses of ill fame or saloons as tending to interfere with the most efficient prosecution of the war, or to take over the railroads, steamships, telephones or telegraph lines in order to carry on the war.

Therefore, under the war power, Congress could undoubtedly prohibit (1) the future manufacture of whisky and (2) the sale of existing whisky for beverage purposes until the emergency was over which called the power into existence.

SECOND POINT.

The War-Time Prohibition Act is unconstitutional because it violates the Fifth Amendment, in that it takes pre-existing private property for public use without just compensation.

1. *The exercise of the war power is subject to the restrictions contained in the* FIFTH AMENDMENT.. The war power is contained in the original Constitution. The amendments were adopted in order to prevent the Government from assuming the power to trespass upon those rights of persons and property which were believed to be inalienable and are set out in the first Ten Amendments.

It has been held in many cases that each of the great substantive powers of Congress are qualified by, and subject to, the restrictions of the FIFTH AMENDMENT, as, for example, the power to exclude aliens (*Wing Wong* v. *U. S.*, 163 U. S., 228, 234, 237, 238); the power to tax (*U. S.* v. *R. R. Co.*, 17 Wall., 322; *Boyd* v. *U. S.*, 116 U. S., 616); the power to regulate commerce (*Monongahela Navigation Co.* v. *U. S.*, 148 U. S., 312, 336; *U. S.* v. *Joint Traffic Ass'n.*, 171 U. S., 505, 571; *U. S.* v. *Cress*, 243 U. S., 316, 326; *U. S.* v. *Lynah*, 188 U. S., 445, 471; *Adair* v. *U. S.*, 208 U. S., 161, 180; *Carroll* v. *Greenwich Insurance Co.*, 199 U. S., 401, 410); and the war power (*Ex parte Milligan*, 4 Wall., 2; *Ochoa* v. *Hernandez*, 230 U. S., 139, 153; *U. S.* v. *Delaware & H. Co.*, 164 Fed., 215, 231; *McCray* v. *U. S.*, 195 U. S., 27, 61).

In *Ex parte Milligan*, 4 Wall., 2, a man was arrested during the Civil War, tried by a military commission, and condemned to be hanged. It was held that even during the stress of the Civil War, the guarantees of the Fourth, Fifth and Sixth Amendments for the protection of the citizen were in force even as against the

war powers of the Government; and that the accused was entitled to a trial by jury.

After quoting the 4th, 5th and 6th Amendments, the Court said (p. 120):

> "These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and *so jealous were the people that these rights, highly prized, might be denied them by implication,* that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, *it would never have been ratified.*
>
> Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are *now,* after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future."

This Court then continued, in language directly applicable in the present case:

> "The Constitution of the United States is a law for rulers and people, *equally in war and in peace*, and covers with the shield of its protection all classes of men, *at all times*, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be *suspended* during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false."

This Court rejected the contention that in a time of war a military commander could, within the lines of his military district, suspend civil rights (when the courts were open) and in words, which are equally applicable to the present effort by Congress to evade Constitutional guaranties under the plea of wartime necessity said (pp. 124-5):

> "The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power'—the attempt to do which by the King of Great Britain was

deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.

This nation, as experience has proved, cannot always remain at peace, and *has no right to expect that it will always have wise and humane rulers,* sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, *the dangers to human liberty are frightful to contemplate.* If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which *time* had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary dis-

turb, except the one concerning the writ of *habeas corpus.*"

This doctrine authoritatively established in *Ex parte Milligan,* has been followed by many courts, as appears in the citations collected in Volume 6, Rose's notes on the United States Reports, revised edition, page 4. Among the State Court cases is that of *Johnson* v. *Jones,* 44 Ill. 142 (decided in 1867) where the court laments the necessity of holding unlawful the exercise of an assumed war power by the then late President Lincoln, who had caused a United States Marshal during the Rebellion to arrest a citizen of Illinois without process.

The court, at pages 155, 156, stated the rule to be as follows:

> "The doctrine that a state of war of itself suspends, at once and everywhere, the constitutional guaranties for liberty and property, finds no support in the constitution and is inconsistent with every principle of civil liberty and free government."

In *Monongahela Navigation Co.* v. *U. S.,* 148 U. S., 312, 336, it is said:

> "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment, we have here-

> tofore quoted. CONGRESS HAS SUPREME CONTROL OVER THE REGULATION OF COMMERCE, BUT IF, IN EXERCISING THAT SUPREME CONTROL, IT DEEMS IT NECESSARY TO TAKE PRIVATE PROPERTY, THEN IT MUST PROCEED SUBJECT TO THE LIMITATIONS IMPOSED BY THIS FIFTH AMENDMENT, AND CAN TAKE ONLY ON PAYMENT OF JUST COMPENSATION. The power to regulate commerce is not given in any broader terms than that to establish post offices and post roads; but, if Congress wishes to take private property upon which to build a post office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. * * * Whatever be the true value of that which it takes from the individual owner must be paid to him, before it can be said that just compensation for the property has been made. * * *"

To the same effect is *McCray* v. *United States,* 195 U. S., 27, 61.

It necessarily follows that if, in the exercise of the war power, private property is taken, the owner thereof is entitled to just compensation therefor. This is guaranteed to him by the FIFTH AMENDMENT.

Except the War-Time Prohibition Act now under consideration, all other Acts of Congress providing, under the war power, for the taking of property, contain provisions for mak-

ing just compensation to the owners thereof. (See p. 36, *infra.*)

2. *Whisky is property and when taken for public use, is entitled to the protection of the* FIFTH AMENDMENT. Whatever may be the ultimate decision of the question reserved in *Bartemeyer* v. *Iowa* respecting the power of a State to prohibit the sale of intoxicating liquor existing before the passage of the prohibitory statute, certainly so far as the Federal Government is concerned, whisky is property which the United States can no more take without first giving just compensation, than it could take cotton or tobacco. This is so because generally speaking, the United States has no concern with respect to the character of intoxicating liquors or any police power with respect thereto.

In *Leisy* v. *Hardin,* 135 U. S., 100, 110, the Court said:

> "That ardent spirits, distilled liquors, ale and beer, are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts, is not denied."

In *Wynehamer* v. *People,* 13 N. Y., 378, already referred to, it was said (pp. 383-384):

> "In determining the question, whether the 'Act for the prevention of intemperance, pauperism and crime' was an exercise of power prohibited to the legislature, an accurate perception of the subject to which it relates is the first requisite. It is, then, I believe, universally admitted that when this law was passed intoxicating liquors, to be used as a beverage were *property* (the italics are the court's) in the most absolute and unqualified sense of the term; and, as such, as much entitled to the protection of the constitution as lands, houses or chattels of any description."

After quoting, on page 386, supporting language from Blackstone's Commentaries, the Court continues thus:

> "While this language of the English commentator by no means expresses the full force of the limitation imposed upon the legislature by the people of this state in their written constitution, it contains, nevertheless, a vindication of the sanctity of private property, as against theories of public good, eminently applicable to our own condition and times. In a government like ours, theories of public good or public necessity may be so plausible, or even so truthful, as to command popular majorities. But whether truthful or plausible merely, and by whatever numbers they are assented to, there are some absolute private

> rights beyond their reach, and among these the constitution places the right of property."

In *Commonwealth* v. *Campbell,* 133 Ky., 50, the Court said:

> "As spiritous liquor is a legitimate subject of property, its ownership and possession cannot be denied, when that ownership and possession is not in itself injurious to the public. The right to use liquor for one's own comfort, if the use is without direct injury to the public, is one of the citizen's natural and inalienable rights guaranteed to him by the Constitution, and cannot be abridged as long as the absolute power of a majority is limited by our present Constitution."

To the same effect see *Barber* v. *Commonwealth,* 182 Ky., 200.

The laws of Kentucky provide for whisky warehouses, for the taxation of whisky and of the storage while the whisky is in a warehouse (Ky. Stat., Sec. 4768).

In *Commonwealth* v. *Kentucky Distilleries & Warehouse Co.,* 143 Ky., 314, it was held that storage upon whisky was property and taxable as such. The opinion contains many definitions of property, among which the following are instructive:

> "The term 'property' is a generic term of extensive application; and while strictly

speaking, it means only the right which a person has in relation to some thing, or that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects, it is frequently used to denote the subject of the property, or thing itself, which is owned, or in relation to which the right of property exists. * * *

The term is therefore said to include everything which is subject of ownership corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal, choses in action as well as in possession, everything which has an exchangeable value or which goes to make up one's wealth or estate * * * * * * the word 'property' as used in the revenue statute means everything of value that a person owns, that is or may be the subject of sale or exchange, or that when offered for sale will bring some price."

Whisky is the subject of larceny, gift, sale, devise, inheritance, taxation, and indeed possesses every attribute of property that is possessed by any other article to which that name can be given.

Kentucky had the power to determine for itself what is, and what is not, a proper subject for ownership by its people. Whisky being recognized as property by the State, there is no power in the Federal Government to say

that it shall not be considered as property. A mere statement of the proposition is all that is needed but it may be observed that the Federal Government itself has for many years recognized whisky as property by deriving an enormous revenue from taxing it, by having an immense governmental bureau for the purpose of guarding and protecting it and prosecuting those who interfere with whisky as property.

It is not material to inquire whether some States in the exercise of their police powers, may or may not have outlawed whisky and decreed that it shall not be considered as property, but shall be considered on the same basis as impure food, gambling devices, or other articles of a prohibited character.

In Kentucky—and it is there that the question arises—whisky is as much property, and the owner thereof is as much entitled to the constitutional protections given it as would be the case with respect to war munitions, tobacco, cotton, or oil.

3. *The War-Time Prohibition Act takes the Kentucky Company's private property for public use, but makes no provision for just compensation to the owner. Therefore, the*

Act is unconstitutional. All the whisky in question was made by the Kentucky Co. years before the war began; has belonged to it continuously ever since its original manufacture; and consists of two classes, to wit (*a*) 15,000 gallons in the company's exclusive possession, on which it has paid $102,169.60 taxes, of which $51,084.80 was exacted and received by the Government on September 24, 1919, under the retroactive increased tax law of February 24, 1919, and (*b*) 22,157 barrels (1,091,253 proof gallons) in bonded warehouses under the Government's exclusive control, and for the taxes on which the United States holds the company's bonds, amounting to over ten millions of dollars.*

This whisky being property, has it been "taken" within the meaning of the FIFTH AMENDMENT?

The present record does not present a case (and the Government can not contend that it does) where property has been taken or de-

*It will be observed that *no* claim is made here on account of the depreciation of the distillery plants or on account of any property, the use of which has been restricted. The claim here relates solely to the fact that the actual physical whisky is either held by the Government in the case of the bonded goods, or, in the case of floor stock, its sale by the owner is absolutely prohibited.

stroyed in the course of the actual conflict of war. For such losses there is no compensation. See *U. S.* v. *Pacific R. R. Co.,* 120 U. S., 227; *Mitchell* v. *Mallory,* 13 How., 115, and *U. S.* v. *Russell,* 13 Wall., 623.) The doctrine of these cases is thus stated in *U. S.* v. *Pacific R. R. Co.:*

> "The destruction or injury of private property in battle or in the bombardment of cities and towns and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences."

What does the Act do?

Although the Kentucky Co. has expended over one million of dollars in the manufacture of this whisky and a large sum in the taxes it has been compelled by the Government to pay on part of the same, no provision whatever has been made for compensating the Company for this loss—not even for the taxes it was forced to pay to this very same Government.

The Act prohibits the Kentucky Co. from either (*a*) selling the whisky which it has in its own possession fully tax paid, or (*b*) obtaining possession of its property which is in the Government's bonded warehouses. This

ban, which has lasted since June 30, 1919, will continue until some undefined date in the future, when, according to the Government's contention, the Treaties of Peace with both Germany and Austria shall have been ratified by the Senate and the President shall have proclaimed demobilization terminated. In the meantime the EIGHTEENTH AMENDMENT was proclaimed by Acting Secretary of State Polk on January 29, 1919, to have been adopted. By its very terms, it expressly gives a year within which existing liquor might be disposed of (doubtless to meet the question reserved in *Bartemeyer* v. *Iowa,* page 10, *supra*). The effect of the War Prohibition Act is that the Kentucky Co. *has been deprived of every attribute of ownership,* except the necessity of paying taxes to the United States upon the very property which the Government refuses to allow the owner to use or sell. If this does not constitute a "taking" of a person's property, the English language has lost its meaning.

In *Buchanan* v. *Warley,* 245 U. S., 60, 74, 81, it was held that a city ordinance forbidding colored persons to occupy houses in blocks where the greater number of houses are

occupied by white persons, deprived an owner of his property without due process of law, in that it affected an essential element of property, to wit, impaired *the right of sale.* The Court said:

> "Property is more than the mere thing which a person owns. It is elementary that it includes *the right to* acquire, use, and *dispose* of it. The Constitution protects these essential attributes of property. *Holden* v. *Hardy,* 169 U. S. 366, 391. Property consists of the free use, enjoyment, and *disposal* of a person's acquisitions without control or diminution save by the law of the land. 1 Blackstone's Commentaries (Cooley's Ed.), 127. • • •
>
> The right which the ordinance annulled was the civil right of a white man to *dispose* of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person."

In *Wynehamer* v. *People, supra,* the court at page 387 said:

> "We must be allowed to know, what is known by all persons of common intelligence, that intoxicating liquors are produced for sale and consumption as a beverage; that such has been their primary and principal use in all ages and countries; that it is this use which has imparted to them, in this state, more than ninety-nine hundredths of their commercial value."

And after continuing with the language quoted above at page 11, the Court on page 389 said:

> "As property, the right to sell them is denied and their commercial value is thus annihilated."

And on p. 396:

> "Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment."

And on page 398:

> "When a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a Constitutional provision intended expressly to shield private rights from the exercise of arbitrary power."

In *Foster* v. *Scott*, 136 N. Y., 577, the Court said:

> "It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment or the *power of disposition at the will of the owner.*"

In *U. S.* v. *Cress*, 243 U. S., 316, and *U. S.* v. *Lynah*, 188 U. S., 445, where the construc-

tion of dams in a navigable river resulted in the overflow of lands, there was held to be a "taking" even if the overflow was only at certain times, which injured but did not destroy the value of the lands so overflowed.

The Kentucky Co. was required by Federal statute to provide, at its own expense, bonded warehouses, which were under the exclusive control of the Government. (*Taney* v. *Penn. Bank,* 232 U. S., 175; *Dale* v. *Pattison,* 234 U. S., 379.) By statute, it was also authorized to leave its whisky in bond for eight years, and to bottle it in bond at any time after the first four years.

The whisky in question was rightfully in the Kentucky Co.'s bonded warehouses and it had the right to rely upon the Bottling in Bond Statute, and furthermore it could not have bottled a large part of the whisky because it had not been in the warehouses four years at the time the War Prohibition Act was enacted.

It is therefore no answer to suggest that the Kentucky Co. should have withdrawn the whisky from bond and sold the same before the War Prohibition Act was enacted.

As the "taking" is solely under the war power, it is concededly for a "public use."

The final question is: Has "just compensation" been made? If not, what is the effect of the omission upon the validity of the Act?

In every other instance where Congress has authorized the taking or use of property for war purposes, the Act itself has provided that the owner shall receive "just compensation therefor" to be determined by the President, or, if that is not satisfactory to the owner, he shall receive 75 per cent of the President's award, and is entitled to sue the United States for the balance claimed.* Indeed, in another

*Acts of	Citation	Authorizing the seizure or requisition of
March 4, 1917	39 Stat., 1192	Factories, ships and war materials.
July 1, 1918	40 Stat., ...	
June 15, 1917	40 Stat., 182	Street railroads, equipment, etc., and the acquisition of title to land, plants, etc.
April 22, 1918	40 Stat., ...	
Nov. 4, 1918	40 Stat., ...	
Aug. 10, 1917 (Food Control Act)	40 Stat., 279	Foods, fuels, factories, packing houses, coal mines, coal supplies, etc.
Mar. 21, 1918	40 Stat., ...	Railroads.
May 16, 1918	40 Stat., ...	Houses, buildings, properties, etc., in District of Columbia.
June 4, 1918	40 Stat., ...	
July 18, 1918	40 Stat., ...	Ships.
July 16, 1918	40 Stat., ...	Telephone and telegraph systems.
October 5, 1918	40 Stat., ...	Mines, mineral lands, etc.
Nov. 21, 1918	40 Stat., ...	Buildings.
March 4, 1919	40 Stat., ...	Certain facilities.

See, also, Act of June 3, 1916 (39 Stat., 213) for the mobilization of industries, which authorizes the seizure of munition plants and provides that the compensation therefor shall be "fair and just," and the Act of March 4, 1917 (39 Stat., 1169), authorizing the acquisition of aeroplane patents by condemnation, for which $1,000,000 was appropriated.

section of this very War-Time Prohibition Act of November 21, 1918, the requisition of buildings for the Agricultural Department is authorized, and the Secretary of Agriculture is directed to "ascertain and pay just compensation for such use"; and if the amount so fixed is not satisfactory to the owner, he shall receive 75 per cent thereof at once, and may sue for the balance claimed.

It is thus obvious that Congress fully realized the necessity of making adequate provision for just compensation in every other case where it interfered with anyone's property or his use thereof.

But when under "the clamor of an excited people" Congress determined to deal with whisky, the time had arrived, as warned in *Ex parte Milligan*, 4 Wall., 2, 119, 120,

> "when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper";

and so no provision for any compensation was made. But, on the contrary, Congress shortly thereafter (February 24, 1919) imposed a heavy retroactive tax (double the then existing tax) on all whisky, including that already tax

paid; the tax was assessed and collected; and the owners are now prohibited from selling the very whisky on which they have paid that tax, a large part of which the Kentucky Co. was compelled to pay as late as September 24, 1919.

The Government contends that under the power to declare war there were conferred upon Congress those powers commonly called the "Police Powers" of the States, and the Government argues that because the States can prohibit the sale of liquor without making any compensation therefor, Congress can do likewise.

There are several answers to this contention:

(1) In the exercise of war powers there is not conferred upon Congress any police power, but there is merely exercised by Congress the all-embracing war power. It is in no sense a police power, but essentially a war power, and, as such, subject to such other limitations upon congressional action as the Constitution imposes. It is a false analogy to say that under the war power Congress is endowed with what are commonly called the po-

lice powers of the states and consequently may exercise them as unlimitedly as do the States. But the police powers of the States are not subject to the FIFTH AMENDMENT, whereas the war powers of Congress are.

(2) It has never been decided by this Court (but the question has always been expressly reserved) whether even the states can, under their police power, prohibit the sale of liquor existing at the time of the passage of the statute. All the whisky involved in the present case was in existence long before the declaration of war. Therefore, even on the analogy of the States' police powers, such cases as *Mugler* v. *Kansas, Beer Co.* v. *Massachusetts,* and *Bartemeyer* v. *Iowa,* are inapplicable because they relate solely (1) to the prohibition of *future* manufacture and (2) to the sale or possession of liquor which was made *after* the passage of the statute.

(3) The FIFTH AMENDMENT is a direct limitation upon the war power; and any exercise of the war power is subject to its provisions. Nor can it be evaded by the suggestion that because the States (not being subject to the FIFTH AMENDMENT) can prohibit the manufacture and sale of subsequently acquired

liquor, Congress (all of whose powers *are* subject to the FIFTH AMENDMENT) can prohibit the sale of *pre-existing* stocks of liquor.

(4) The fallacy in the Government's argument is that because, under the reserved power of the States they always had the right to prohibit the liquor traffic, and under such power were not required to make any compensation for the incidental damage to brewery plants or distilleries which could no longer be used for their particular purpose, therefore, Congress under the war power possesses the same unrestricted rights.

While it is true that Congress' exercise of the war power can accomplish anything which the States can accomplish under their police power, yet the qualifications imposed thereon are different. So far as the Federal Constitution goes the States may require any bail they please, but Congress, even in the exercise of its war powers, is prohibited from requiring excessive bail. Again, under the police power, the States might even refuse a public trial or require in a criminal cause a person to be a witness against himself; but because Congress in the exercise of its war power can do anything necessary to win the war, Congress

is not relieved in the exercise of such powers, of the prohibition against self-incrimination or of the requirement for a public trial.

The instances might be multiplied where States are free in the exercise of their police powers, from requirements to which Congress, even in the exercise of its war power, *is* subject. The difficulty with the Government's argument is, that it ignores the limitations imposed by the FIFTH AMENDMENT upon the war power and simply assumes that what the States can do under the police power with regard to the manufacture or sale of liquor acquired *after* the passage of the prohibitory statute, Congress can also do, even as to *pre-existing* liquor. The conclusion does not follow from the premise, for three reasons:

(*a*) What the State can do as to liquor *subsequently acquired* is no argument as to what Congress can do with respect to liquor existing *before* the statute is passed;

(*b*) What the States, with unlimited police powers, can do for public purposes is no precedent as to what Congress can do.

(*c*) The exercise of war powers does not

place Congress in the same position as the States are with respect to their police powers.

The Kentucky Co. invokes, for its protection from arbitrary confiscation, those principles of constitutional liberty embodied in the FIFTH AMENDMENT, which in the *Milligan* case this Court so strongly upheld.

The law is abundantly settled that while the FIFTH AMENDMENT does not require that the "just compensation" shall be actually paid in advance of the "taking," nevertheless, the owner is entitled to some reasonable, certain and adequate provision for obtaining such compensation before his ownership or possession can be interfered with.

In *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S., 641, 658, it was held "just compensation" was sufficiently provided for when the act of condemnation stipulated that before entering upon the land, payment should be made into court of double of the amount of the award of referees appointed by the President; from which award either party might appeal to the courts. The court said:

> "It is further suggested that the act of Congress violates the Constitution in that it does not provide for compensation to be

made to the plaintiff *before* the defendant entered upon these lands for the purpose of constructing its road over them.

This objection to the act cannot be sustained. The Constitution declares that private property shall not be taken 'for public use without just compensation.' It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner *is entitled to reasonable, certain and adequate provision for obtaining compensation* before his occupancy is disturbed."

In *Sweet* v. *Rechel,* 159 U. S., 380, 399, it was held that a state statute authorizing the condemnation of land was valid. The court said:

"But it is a *condition precedent* to the exercise of such power that the statute make provision for reasonable compensation to the owner."

After holding that the provisions of the Massachusetts Constitution and the Constitution of the United States were the same (p. 400) and reviewing several cases, the court said (p. 402):

"In view of these authorities, it is clear that as the Constitution of Massachusetts does not require compensation to be first actually made or tendered before the rights of the public, in the property taken or ap-

plied, become complete, the requirements of that instrument are fully met where the statute *makes such provision for reasonable compensation as will be adequate and certain in its results.* It is equally clear that an adequate provision is made when the statute, authorizing a public municipal corporation to take private property for public uses, directs the regular ascertainment, without improper delay and in some legal mode, of the damages sustained by the owner, and *gives him an unqualified right to a judgment for the amount of such damages which can be enforced, that is, collected, by judicial process.*

SUBSTANTIALLY THE SAME PRINCIPLES HAVE BEEN ANNOUNCED BY THIS COURT WHEN INTERPRETING THE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES THAT FORBIDS THE TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION."

This Court stated that the constitutional requirement was (p. 402)

"that the owner of property shall have *prompt and certain compensation* without being subjected to undue risk or unreasonable delay";

and that a statute is valid when it

"recognizes the *absolute right* of the owner, upon his property being taken, *to just or reasonable compensation* therefor, and makes provision, in the event of the disagreement of the parties, for an ascertainment, by suit,

> *without unreasonable delay or risk* to the owner, of the compensation to which under the constitution he is entitled, and to a judgment in his favor, enforceable against such corporation in some effective mode, so that the owner can certainly obtain the amount of such compensation."

The court recorded with approval the language in *Brickett* v. *Haverhill Aqueduct Co.*, 142 Mass., 394, 396, that

> "a statute which attempts to authorize the appropriation of private property for public uses, without making adequate provision for compensation, is *unconstitutional and void.*"

In *Backus* v. *Fort Street Union Depot Co.*, 169 U. S., 557, 568, 569, the rule was said to be

> "that if adequate provision for compensation is made authority may be granted for taking possession pending inquiry as to the amount which must be paid, and before any final determination thereof. * * * All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this is accomplished, there is that due process of law which is required by the Federal Constitution."

In *Crozier* v. *Krupp*, 224 U. S., 290, 306, the rule for making compensation under the FIFTH AMENDMENT was thus stated:

> "Indisputably the duty to make compensation does not inflexibly, in the absence of constitutional provisions requiring it, exact, first, that compensation should be made previous to the taking—that is, that the amount should be ascertained and paid in advance of the appropriation—*it being sufficient*, having relation to the nature and character of the property taken, *that adequate means be provided for a reasonably just and prompt ascertainment and payment of the compensation;* second, that, again always having reference to the nature and character of the property taken, its value and the surrounding circumstances, the duty to provide for payment of compensation may be adequately fulfilled *by an assumption* on the part of government of the duty to make *prompt payment* of the ascertained compensation—that is, by the pledge, either expressly or by necessary implication, of the public good faith to that end."

The rule deducible from all the cases is that some provision must be made *in advance* for the compensation, although the money need not actually be paid in advance.

The FIFTH AMENDMENT would be but a flimsy protection if the Government could

take one's private property, leaving it to some future Congress to make provision for compensation. A citizen is not compelled to rely upon the whims and uncertainties of Congress, for receiving payment for his property which has been taken for public use.

The Government concedes that neither under the War Prohibition Act of November 21, 1918, nor under any general statute, is there any possible provision by which the owners of whisky can recover any compensation from the Government, either for the whisky itself or for the taxes heretofore paid upon it.

In conclusion, it is submitted that if instead of being whisky this had been cotton or steel, few would have had the hardihood to defend the validity of the act. But so far as Congress is concerned, the fact that the commodity in question is whisky is immaterial, as Congress has no reserved police power, by which under any supposed war emergency it can withdraw whisky from the protection of the FIFTH AMENDMENT.

Therefore, the Act of November 21, 1918 (having deprived the Kentucky Co. of the most essential attributes of private property,

namely, the rights of possession and sale, without making any provision for compensation for its loss, or reimbursement of the taxes paid thereon), was in excess of the power of Congress, in violation of the FIFTH AMENDMENT, and consequently void with respect to all whisky *which was in existence prior* to November 21, 1918.

THIRD POINT.

The War-Time Prohibition Act has, by its own terms, ceased to be operative.

First. The text of the act and its meaning.

The act declares that

> "for the purpose of *conserving the man power* of the Nation and to *increase efficiency in the production* of arms, munitions, ships, food and clothing for the Army and Navy"

it shall be unlawful after June 30, 1919, to sell liquor

> "until the conclusion of the present war and *thereafter* until the *termination of demobilization*, the date of *which* shall be determined and proclaimed by the President of the United States."

The debates may be resorted to as a means of showing the environment at the time of its

enactment. (*Standard Oil Co.* v. *U. S.*, 221 U. S., 1, 150.)

The Anti-Saloon League wrote Senator Sheppard, the sponsor of the measure, as follows (Cong. Rec., Vol. 56, p. 9627):

> "We feel also that ample provision should be made for *continuing* the prohibition *during the period of demobilization*, which may be quite as important as during *actual hostilities.*"

Senator Sheppard concurred and inserted the words now under discussion and the following debate ensued (id., p. 9641):

> "MR. SHEPPARD. It was put in with a view to the probability that the war might end much sooner than we thought.
>
> MR. WADSWORTH. Oh! Then this is something more than war prohibition.
>
> MR. SHEPPARD. No; I consider the period of demobilization a part of the war. *It is the necessary aftermath of the war.*
>
> MR. WADSWORTH. The Senator has just said it was put in with the idea that the war might end a little sooner than was anticipated.
>
> MR. SHEPPARD. I meant by that the termination of *actual hostilities.*"

The evil sought to be remedied was the danger of intoxication by soldiers, sailors and war

workers during the war and during the subsequent period of demobilization.

Demobilization is defined thus in the Century Dictionary:

> "The act of disbanding troops; the reduction of military armaments to a peace footing."

In 18 Corpus Juris, 484, it is thus defined:

> "In military law, the dismissal of an army or body of troops from active service."

In the Congressional debates Senator WADSWORTH asked Senator SHEPPARD (the proponent of the measure) for

> "his understanding * * * of the meaning of this phrase; the termination of demobilization * * *"

and added:

> "As I understand it 'demobilization' in its ordinary sense is descriptive of the period of time following the war during which the soldiers of the recent belligerents shall have all been discharged and gone to their homes. Is that the understanding of the senator from Texas?"
>
> Mr. Sheppard: "All those who served for the particular period of this emergency, as I understand; all except the regular army."

All suggestions that "demobilization" as used in the War-Time Prohibition Act em-

braces other matters are both unsound and illogical.

At the threshold, we are met by a question of mere grammatical construction. Do the words "date of which" refer only to "termination of demobilization," or do they also qualify the "conclusion of the present war"? Without now stopping to inquire which is the correct interpretation, it will be sufficient to consider the language in both aspects.

(*a*) If the act means that no liquor can be sold until the President shall determine and proclaim "the date" both of the "conclusion of the present war" and *thereafter* of the "termination of demobilization," then we have the following acts by the President, which would indicate that he has done precisely what the act stipulated he should do.

On November 11, 1918, the President in pursuance of his constitutional duty to "give to the Congress information of the state of the Union" addressed a joint meeting of both Houses, summarized the terms of the Armistice, and said:

> "*The war thus comes to an end;* for having accepted these terms of armistice, it will

be impossible for the German Nation to renew it. * * *

It is not now possible to assess the consequences of this consummation. *We know only that this tragical war* whose consuming volume swept from one nation to another until all the world was on fire *is at an end.*"

That he considered the war concluded is shown by his subsequent actions.

On June 28, 1919, the President signed the Treaty of Peace with Germany.

On July 10, 1919, he presented the Treaty to the Senate and formally declared to the Senate that

"*the war ended* in November eight months ago."

Do not these declarations constitute such a determination and proclamation of the "conclusion of the present war" as to satisfy the statute, if required at all?

How could the declaration be more formal or solemn than by an official communication to the Congress which had imposed this duty upon him? (*U. S.* v. *Hicks,* 256 F. R., 707, 710, 713.)

The demobilization process has continued steadily until the strength of both the Army

and Navy has been reduced to less than the authorized peace quota. The production of war munitions has stopped, all existing contracts have been canceled and the Government is actively disposing of its surplus war supplies of arms, munitions, food and clothing, etc.

On September 30, 1919, the War Department officially declared that

> "in general the accident of war and *the progress of demobilization are at an end.*"

On October 27, 1919, the President, in vetoing the Volstead Bill which sought to enforce the War-Time Prohibition Act, stated that the objects of the latter

> "have been satisfied *in the demobilization of the Army and Navy* and whose repeal I have already sought at the hands of Congress."

On November 11, 1919, GEN. PERSHING in an Armistice Day announcement to the people of the United States said:

> "*Our armies have been demobilized* and our citizen soldiers *have returned again* to civil pursuits with the assurance of their ability to achieve therein the success they attained as soldiers."

On pages 11-13 of the Record there are set

forth in great detail the resumption of trade and commerce, the lifting of all restrictions, and censorship of every kind.

If, then, the true interpretation of the act is, that the cessation of its prohibitions depends upon the President's determination and proclamation of (1) the conclusion of the war and (2) the termination of demobilization, it would seem clear that the President has done those very things.

(*b*) The Government may contend that Presidential action is only required with respect to the "termination of demobilization"; and that the "conclusion of the present war" will not occur until the final ratification of the treaties of peace with Germany and Austria.

That contention requires us to determine the meaning of the phrase "conclusion of the present war" as used by Congress in this particular statute. When it is remembered that the purpose of this act was not to affect international relations, nor to define the rights of aliens, nor to prescribe a definite date from which to measure limitation statutes, but was solely to protect soldiers, sailors, and munition workers from intoxication while in, or work-

ing for, the Army and Navy, we see the inapplicability of such cases as *Hijo* v. *United States,* 194 U. S., 315, 323, which held that the Spanish War did not cease until the ratification of peace.

By the use of the expressions

> "until the conclusion of the present war" and "*thereafter* until the termination of demobilization"

Congress showed that the end of the war *it* had in mind was one which must necessarily *precede* demobilization. Congress never could have intended or contemplated that there would or could be a "termination of demobilization" while the war was on. The natural and necessary sequence of events would forbid such a situation. As demobilization is now confessedly completed, the "conclusion of the present war" to which Congress referred *must have already* occurred.

That Congress purposely did not intend to make the "conclusion of the present war" dependent upon any treaty of peace is illustrated by a comparison of the language of this act with that of other war legislation wherein the "end of the war" was involved.

Whenever in the course of its recent war

legislation Congress intended an act to continue in effect until the technical (*de jure*) termination of the war by treaty of peace, it said so in plain language, as for example, "within one year from the signing of a treaty of peace with the Imperial German Government" (Aircraft Act of July 9, 1918); "during the continuance of the present war and for six months after the termination of the war by proclamation of the treaty of peace" (Departmental Reorganization Act of May 20, 1918); "six months after a final treaty of peace shall be proclaimed between this Government and the German Empire" (Act of March 4, 1917, concerning placing of orders for ships, war materials, etc., as amended July 1, 1918, and acts of November 4, 1918, April 22, 1918, and June 15, 1917); "upon proclamation of the final treaty of peace between the United States and the Imperial German Government" (Act of July 18, 1918, providing for the requisition of water carrier facilities); "one year and nine months next following the date of the proclamation of the President of exchange of ratifications of the treaty of peace" (Railroad Control Act of March 21, 1918). "The words 'end of

the war,' as used herein, shall be deemed to mean the date of the proclamation of exchange of ratifications of the treaty of peace" (Food Control Act of October 6, 1917). "Whenever said war shall cease by the conclusion of peace between the United States and its enemies in the present war the President shall so declare by a public proclamation" (Trading with the Enemy Act of June 15, 1917). "The term 'termination of the war' as used in this act shall mean the termination of the present war by treaty of peace as proclaimed by the President" (Soldiers and Sailors Relief Act of March 8, 1918). "Until the treaty of peace shall have been definitely concluded between the United States and the German Government" (Saulsbury resolution of May 31, 1918, respecting remedies of landlords).

In the War-Time Prohibition Act, Congress deliberately departed from its accustomed phraseology and used language specially adapted to the particular matter in hand. It intended war-time prohibition to continue until (1) the war should have been concluded in the ordinary acceptance of the term and (2) *thereafter* until the soldiers and sailors should have been returned into civil life, which is what was

meant by the phrase "termination of demobilization." It would be doing great violence to the language of the act to hold that although demobilization was terminated the war was not yet concluded and that it was still the intention (even if it had the power which it has not) of Congress to keep alive "prohibition" for the protection of an Army and Navy that had been completely demobilized and no longer existed.

A foreign war may not be terminated in respect of various considerations arising under international law and yet be concluded in respect of the rights and duties of citizens of the United States under the Federal Constitution; and it does not follow that because a technical state of war still prevails between the United States, Germany and Austria, notwithstanding the complete demobilization of our Army and Navy, the constitutional rights of the citizens of the United States are to be tested as if war actually existed. It is not necessary that there should ever be a definite treaty of peace. Can it be reasonably contended that in the absence of such treaty Congress might ten years hence exercise as war

powers those which in no other way have been conferred upon it?

The return to normal conditions set forth in detail in the Record, pp. 11-13, shows that there is no longer any shadow of an excuse in fact for the continued exercise of this extraordinary war power of Congress. How is the continuance of prohibition *after* the demobilization of the Army and Navy adapted to the successful prosecution of the war?

War may be terminated in either of three ways, viz.: (1) by a cessation of hostilities on both sides, (2) by conquest and subjugation, or (3) by a treaty of peace.

History presents many instances where there has been a "conclusion of war" without any treaty of peace, the principal difficulty in such cases being that questions might arise (a) as to commercial intercourse between the subjects of the former warring powers, and (b) as to the relationship between the Governments and third Governments with respect to obligations of neutrality. Whether or not war has been terminated, is, after all, a question of fact to be determined in each case by the situation presented. Mr. Seward, while Secretary

of State, announced the true rule in his letter to the Spanish Minister, dated July 22, 1868, when he said:

> "It is certain that a condition of war can be raised without an authoritative declaration of war, and, on the other hand, the situation of peace may be restored by the long suspension of hostilities without a treaty of peace being made. History is full of such occurrences. What period of suspension is necessary to justify the presumption of the restoration of peace has never yet been settled, and must in every case be determined with reference to collateral facts and circumstances." (Diplom. Corr. 1868, Vol. 2, pages 32, 34.)

With regard to the affairs of Spain and Chile, he maintained that if either power claimed that war between them still existed—seeing that active hostilities had long ceased—it would be obliged to substantiate its claim, saying:

> "Peru, equally with Spain, has as absolute a right to decline the good offices or mediation of the United States for peace as either has to accept the same. The refusal of either would be inconclusive as an evidence of determination to resume or continue the war. It is the interest of the United States, and of all nations, that the return of peace, however it may be brought about,

shall be accepted whenever it has become clearly established. Whenever the United States shall find itself obliged to decide the question whether the war still exists between Spain and Peru, or whether that war has come to an end, it will make that decision only after having carefully examined all the pertinent facts which shall be within its reach, and after having given due consideration to such representations as shall have been made by the several parties interested."

While it is desirable that a formal declaration of the resumption of peace shall be made by belligerents in order that their subjects may know when they are entitled to recommence commercial intercourse with each other, and that third States may know when they cease to be neutrals, yet in the present case the subjects of Germany and the United States have already recommenced complete commercial intercourse with each other, and, so far as we are aware, all third States are now treated as no longer neutrals nor do the rules governing neutrality apply, for example, to such nations as Sweden and Norway.

In 1720 the war between Spain and France was terminated by the mere withdrawal of their respective forces; in 1801 the Russian war with Persia begun by Catherine II. was

ended by Paul I. by each side withdrawing their forces. In the war between Spain and her revolted South American colonies, hostilities ceased in 1825, although no technical state of peace was formally established until twenty years later. It was twenty years after Venezuela, Ecuador and Chile secured their respective independence before Spain formally acknowledged the fact. Yet, during that period the war had certainly been concluded and third nations no longer considered themselves neutrals.

In the war of 1866 Prussia neither reduced to submission nor concluded peace with the principality of Lichtenstein, but peace between them was simply recognized as a fact.

In 1867 the war between France and Mexico came to an end by the withdrawal of French troops under pressure by the United States, but it was thirteen years before reconciliation was signalized by a diplomatic instrument and nearly twenty years before a treaty was entered into, although in the meantime they had agreed to waive their respective claims and Mexico had appointed commercial agents in France.

Conversely war may be in full force when a treaty of peace is signed. For example, in the Russo-Japanese war, the armies were in furious conflict while the peace conferences were being held at Portsmouth; and after the signature of the treaty of Portsmouth on September 5, 1905, it was ten days later before the commanders in the field suspended actual hostilities.

In *United States* v. *Hicks,* 256 Fed., 707, the court, in construing the words "during the present war," held that the present war had ended by December, 1918, within the meaning of that statute, saying:

> "The authoritative publications show that, while war is usually terminated by a treaty of peace, and that such treaty is the best evidence of such termination, history shows many instances in which wars were terminated without any treaty at all. * * * The public is oftentimes, perhaps generally, notified of treaties by official proclamation. But there is no prescribed form for such latter documents, and at last they are but official announcements of a state of fact. The President's official communication to Congress met all the conditions of an official proclamation, so far as such documents are designed for giving information. * * *
>
> Again, the President's official statement

was either true or it was mere rhetorical optimism. This court is by no means at liberty to yield to the latter alternative, for it is clearly of opinion, in view of current public history, that the President's statement was, in fact, correct when made, even if an agreed upon treaty of peace has been delayed in the making."

Second. The War-Time Prohibition Act has become obsolete.

The question is whether or not this act *now* sought to be applied against the Kentucky Co. does or does not violate its constitutional rights *at the present time*.

The Rate cases are a strong example of laws which may be valid at the time they are passed but which, on account of changing conditions become at a later date inapplicable.

See *Lincoln Gas & Electric Light Co.* v. *Lincoln*, 250 U. S., 256, 269; *Minnesota Rate Cases*, 230 U. S., 352, 473; *Missouri Rate Cases*, ib., 474, 508; *Willcox* v. *Consolidated Gas Co.*, ib. 19, 54.

This Court has clearly enunciated this doctrine in *Johnson* v. *Gearlds*, 234 U. S., 422, 446, and *Perrin* v. *United States*, 232 U. S., 478, 486. In these cases the court passed upon

the right of Congress to prohibit the sale of intoxicating liquor to Indians in the Indian Territory or within the boundaries of a state In the *Perrin* case the court said, at p. 486:

> "As the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis, Thus, a prohibition like that now before us, if covering an entire State when there were only a few Indian wards in a single county, undoubtedly would be condemned as arbitrary. And a prohibition valid in the beginning doubtless would become inoperative when in regular course the Indians affected were completely emancipated from Federal guardianship and control. *A different view in either case would involve an unjustifiable encroachment upon a power obviously residing in the State.* * * *
>
> The fact that the conditions may become so changed in the future as to render the prohibition inoperative affords no reason for condemning it now. Unless sooner repealed, it will continue in force as long as the presence and status of the Indians sustain it as a Federal regulation."

In *Johnson* v. *Gearlds, supra*, the court restated the rule and continued:

> "We do not mean to say that if it appeared that no considerable number of Indians remained wards of the Government within the territory in question, the courts would not be justified in declaring that since the constitutional warrant for the restriction no longer existed the restriction must expire with it."

The complete demobilization of the armed forces, the abandonment of all war production, the disposition of existing war supplies and the resumption of every kind of peace time intercourse with the enemy, all show that the emergency which alone could call into being the power of Congress over liquor sales within a State, has wholly passed. Therefore the Act is no longer operative.

LEVY MAYER,

WM. MARSHALL BULLITT,

Counsel for Appellee.

November 20, 1919.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 601.

GEORGE S. HAWKE, PLAINTIFF IN ERROR,

vs.

HARVEY C. SMITH, AS SECRETARY OF THE STATE OF OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED NOVEMBER 13, 1919.

(27,356)

(27,356)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 601.

GEORGE S. HAWKE, PLAINTIFF IN ERROR,

vs.

HARVEY C. SMITH, AS SECRETARY OF THE STATE OF OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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1 UNITED STATES OF AMERICA,
Supreme Court of Ohio, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I have hereunto subscribe- my name and affixed the Seal of the said Supreme Court of Ohio, in the City of Columbus, this 11th day of November, A. D. 1919.

[Seal The Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk Supreme Court of Ohio,
By SEBA H. MILLER,
Deputy Clerk.

2 Supreme Court of Ohio.

No. 16477.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant in Error.

Petition for Writ of Error.

To the Honorable Chief Justice of the Supreme Court of the United States and to the Associate Justices of the Court:

George S. Hawke, the plaintiff in the above entitled cause, shows by this petition to this honorable court, that in the records, proceedings and decisions in the Supreme Court of the State of Ohio, the same being the highest court of said state in which a decision could be had in this suit, a manifest error has occurred, greatly to the damage of said George S. Hawke.

That, as appears in the record and proceedings there was drawn in question the validity of Article II, Section I, and Section 1*a* of the Ohio Constitution, providing for a proposed referendum election on the question of approving or rejecting the action of the General Assembly of Ohio in ratifying the Woman Sufferage Amendment to the Federal Constitution, the question being whether or not said provisions of the Ohio Constitution are repugnant to the Constitution of the United States, and of the Articles of Compact of the Ordinance of 1787, and the decision is in favor of the validity of said sections of the Ohio Constitution, all of which fully appears

in the records and proceedings of the case and is specifically set forth in the assignment of errors filed herewith.

Wherefore petitioner prays that a writ of error be allowed, and that a transcript of record, proceedings and papers upon which said decree was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of such court in such cases made and provided, and that the same be by this honorable court inspected and corrected in accordance with law and justice.

GEORGE S. HAWKE,
Attorney for Petitioner.

[Endorsed:] Filed Nov. 11, 1919. Supreme Court of Ohio. Frank E. McKean, Clerk.

3 Supreme Court of Ohio.

No. 16447.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant in Error.

Assignment of Errors.

Assignment of Errors on Writ of Errors from the Supreme Court of the United States to the Supreme Court of the State of Ohio.

Now comes George S. Hawke, in connection with the petition for a writ of error herein, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Ohio in the above entitled action, there is manifest error in this, to-wit:

First. The Supreme Court of the State of Ohio erred in affirming the judgment of the Court of Appeals of Franklin County, Ohio, and in refusing to reverse said judgment and remand this cause to the Court of Appeals of Franklin County, Ohio, for further proceedings.

Second. The Supreme Court of the State of Ohio should have found that said Court of Appeals of Franklin County, Ohio, erred in sustaining the demurrer of said Harvey C. Smith, Secretary of the State of Ohio, to the amended petition of said George S. Hawke.

Third. The judgment of said Supreme Court of Ohio was given for said Harvey C. Smith, Secretary of the State of Ohio, when it ought to be given for the said George S. Hawke.

Fourth. The judgment of the Supreme Court of the State of Ohio, in this cause is in contravention of Article V of the Constitution of

the United States which provides that amendments to the Federal Constitution shall be valid to all intents and purposes when ratified by the legislatures of three-fourths of the several states. And that the new amendment to the Ohio Constitution relating to a
4 referendum of the electors on acts of the General Assembly in ratifying federal amendments ,is unconstitutional in that it conflicts with the United States Constitution, and is repugnant to the Constitution of the United States; and also violative of and repugnant to the provisions of Article 5 of the Articles of Compact contained in the Ordinance of 1787 providing for a republican form of government in the states to be formed in the territory of the United States northwest of the river Ohio.

GEORGE S. HAWKE,
Attorney for Plaintiff in Error.

[Endorsed:] Filed Nov. 11, 1919. Supreme Court of Ohio, Frank E. McKean, Clerk.

5 Supreme Court of Ohio.

No. 16447.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant in Error.

Entry.

Nov. 11, 1919.

On this day came the plaintiff in error, George S. Hawke, and presents to the Court his petition praying for the allowance of a Writ of Error from the Supreme Court of the United States, and filed therewith his assignments of error.

Which said writ of error is allowed and said plaintiff is ordered to give bond to cover the costs in this action in the amount of Two Hundred Dollars ($200.00).

I certify that a federal question was made in this case, viz: Whether a proposed referendum election under the Constitution of Ohio, Article II, Section 1 and Section 1-*a*, as amended in 1918, can be had on the action of the General Assembly of the State of Ohio in ratifying on June 16, 1919, the Woman Suffrage amendment to the Federal Constitution, under Article V of the United States Constitution, and whether said proposed referendum was violative and repugnant to the provisions of Article V, of the Articles of Compact contained in the Ordinance of 1787 providing for a republican form of government in the states to be formed in the territory of the United States northwest of the river Ohio.

HUGH L. NICHOLS,
Chief Justice, Supreme Court of Ohio.

[Endorsed:] Filed Nov. 11, 1919. Supreme Court of Ohio. Frank E. McKean, Clerk.

6 Supreme Court of Ohio.

No. 16447.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant in Error.

Writ of Error and Order for Allowance of Writ of Error.

UNITED STATES OF AMERICA, *ss:*

To the President of the United States to the Honorable Judges of the Supreme Court of Ohio, Greetings:

Whereas, in the record and proceedings and in the rendition of the judgment of the above entitled cause which is now before you, or some of you, between George S. Hawke, plaintiff in error, and Harvey C. Smith, as Secretary of the State of Ohio, defendant in error, your court being the highest court of said State of Ohio having jurisdiction of the cause, there was drawn in question the validity of Article II, Section I and Section 1*a* of the Ohio Constitution, providing for a proposed referendum election on the question of approving or rejecting the action of the General Assembly of Ohio in ratifying the Woman Suffrage Amendment to the Federal Constitution, the question being whether or not said provisions of the Ohio Constitution are repugnant to the Constitution of the United States, and of the Articles of Compact in the Ordinance of 1787, and the decision is in favor of the validity of said sections of the Ohio Constitution, and whereas, there is manifest error in said judgment to the great damage of said George S. Hawke, and whereas we are willing if there is error it should be duly corrected, we command you therefore, if judgment be given therein, that you send under seal of your court the record and proceedings in said cause to the Supreme Court of the United States together with this writ, within such time as may be necessary in order that you have the same at Washington on the — day of November, 1919, in the said Supreme Court of the United States then and there held, that the record and proceedings aforesaid may be then inspected by the Supreme Court of the United States and that said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 11th day of November, 1919.

[Seal United States District Court, Sou. Dist., Ohio.]

B. E. DILLEY,
Clerk of the District Court of the United States, Southern District of Ohio.

Writ of error allowed upon the execution of a bond in the sum of $200.00 this 11th day of November, 1919.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of Ohio.

[Endorsed:] Filed Nov. 11, 1919. Supreme Court of Ohio, Frank E. McKean, Clerk.

7 Supreme Court of Ohio.

No. 16447.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant in Error.

Waiver of Citation.

The issuance and service of a citation is hereby waived this 11th day of November, 1919.

JOHN G. PRICE,
Attorney General;

B. W. GEARHEART,
Special Counsel,
Attorneys for Defendant in Error.

(Endorsed:) Filed Nov. 11, 1919. Supreme Court of Ohio. Frank E. McKean, Clerk.

8 In Supreme Court of Ohio.

No. 16447.

GEORGE S. HAWKE,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio.

Præcipe.

Columbus, Ohio, Nov. 11, 1919.

To the Clerk:—

You are hereby directed to make a transcript of, and to certify and transmit the entire record in this cause, together with all pleadings and papers filed in this court, excepting the original petition and demurrer thereto, filed in the Common Pleas Court.

G. S. HAWKE,
Attorney for Plaintiff in Error.

[Endorsed:] Filed No. 11, 1919. Supreme Court of Ohio. Frank E. McKean, Clerk.

9 Supreme Court of Ohio.

No. 16447.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant in Error.

Bond.

(Filed Nov. 11, 1919.)

Bond on Writ of Error from the Supreme Court of the United States to the Supreme Court of Ohio.

Know all men by these presents:

That we, George S. Hawke, as Principal, and The National Surety Company, as Surety, are held and firmly bound unto Harvey C. Smith, Secretary of the State of Ohio, in the sum of $200.00 to be paid to the said obligee, and his successor in office; to the payment of which, well and truly to be made, we bind ourselves, our successors, administrators and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of November, A. D. 1919.

Whereas, the above George S. Hawke, has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Ohio;

Now, Therefore, the condition of this obligation is such that if the above named George S. Hawke, shall prosecute his said writ of error and answer all costs and damages if he shall fail to make good his said plea, then this obligation shall be void; otherwise to remain in full force and effect.

GEORGE S. HAWKE,
NATIONAL SURETY COMPANY,
A. W. GEISSINGER,
Res. Vice-Pres.
RALPH C. TREDWAY,
Res. Ass't Sec'y.

On this 11th day of November, 1919, the above bond having been presented to me for approval, and having examined the same and finding it in conformity to law and the orders of this Court, and sufficient in all respects, I hereby approve the same.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

10 Supreme Court of the State of Ohio, January Term, A. D. 1919.

No. 16447.

Title.

GEORGE S. HAWKE, Plaintiff in Error,
v.
HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant in Error.

Action: Error to the Court of Appeals of Franklin County.

Attorney for plaintiff in error: George S. Hawke, Cincinnati, Ohio.
Attorneys for defendant in error: John G. Price, Attorney General; B. W. Gearheart, Special Counsel, Columbus, Ohio.

(*Transcript of Docket Entries.*)

(Minute Book No. 35, page 247.)

1919.
Nov. 8. Petition in error and waiver of summons filed.
" " Court of Appeals transcript and original papers filed.
" 11 Judgment affirmed on authority of Hawke v. Smith, Secretary of State, No. 16349, decided September 30, 1919.

(Journal No. 28, page —.)

11 Supreme Court of Ohio.

No. 16447.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, Secretary of the State of Ohio, Defendant in Error.

Entry of Affirmance.

Nov. 11, 1919.

Error to the Court of Appeals of Franklin County.

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Franklin County, and was submitted by counsel. On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said Court of Appeals be, and the same is hereby affirmed on authority of Hawke vs. Smith, Sec'y of State, Case No. 16349; Decided Sept. 30, 1919; and it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendants in error recover from the plaintiff in error their costs herein expended, taxed at $—.

Ordered, that a special mandate be sent to the Common Pleas Court of Franklin County, to carry this judgment into execution.

Ordered, that a copy of this entry be certified to the Clerk of the Court of Appeals of Franklin County, "for entry."

12 In the Supreme Court of Ohio.

#16447.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant in Error.

Petition in Error.

(Filed Nov. 8, 1919.)

Plaintiff in error says that at the November term, 1919, of the Court of Appeals of Franklin County, Ohio, to-wit: on the first day of November, 1919, in a certain action then pending in said court wherein George S. Hawke was plaintiff in error and said Harvey C. Smith, as Secretary of the State of Ohio, was defendant in error, said

defendant in error, by the consideration of said Court of Appeals recovered a judgment against the plaintiff in error affirming a judgment theretofore recovered by said defendant in error against this plaintiff in error in a certain action then pending in the Court of Common Pleas of Franklin County, Ohio, wherein said plaintiff in error was plaintiff and defendant in error was defendant said judgment of said Court of Common Pleas, so affirmed by said Court of Appeals, being a judgment sustaining the demurrer of the said defendant in said court to the amended petition of plaintiff and dismissing said amended petition at plaintiff's cost. All of which will more fully and at large appear in the record of said action.

Plaintiff in error files herewith a duly certified transcript of the docket and journal entries in said case, together with all the original papers herein.

Plaintiff in error says that there is error in said record, judgment and proceedings of said Court of Appeals, manifest in the record of said court and to the prejudice of plaintiff in error in the following particulars, namely:

13 1. The said Court of Appeals erred in rendering judgment affirming the judgment, orders and proceedings of said Common Pleas Court of Franklin County, Ohio.

2. Said Court of Appeals erred in its findings and judgment that there was no error in the judgment and proceedings in said action in said Court of Common Pleas of Franklin County, Ohio, to the prejudice of this plaintiff in error

3. Said Court of Appeals erred in rendering judgment against this plaintiff in error affirming the judgment of the said Court of Common Pleas of Franklin County in sustaining the demurrer of defendant in error to the amended petition of plaintiff in error and in dismissing the amended petition of plaintiff in error at his costs.

Plaintiff in error further says that this case involves questions arising under the Constitution of the United States and of the State of Ohio, namely: Article V of the Constitution of the United States, and Article II, Sections 1 and 1*a* of the Constitution of Ohio, and that it draws in question the validity of an authority exercised under the State of Ohio on the ground of such authority being repugnant to the Constitution of the United States, and also violative of and repugnant to the provisions of Article 5 of the Articles of Compact contained in the Ordinance of 1787 providing for a republican form of government in the states to be formed in the territory of the United States northwest of the river Ohio.

Wherefore, plaintiff in error prays that the findings and judgment of said Court of Appeals and Court of Common Pleas of Franklin County may be reversed, and that plaintiff in error may be restored to all things he has lost by reason thereof.

GEORGE S. HAWKE,
Attorney for Plaintiff in Error.

14 *Waiver.*

Issuance and service of summons in error in the above action is hereby waived and the appearance of defendant in error entered. Dated this 8 day of November, 1919.

JOHN G. PRICE,
Att'y Gen.;

B. W. GEARHEART,
Special Counsel,
Att'ys for Defendant in Error.

15 *Transcript of Docket and Journal Entries—Supreme Court.*

STATE OF OHIO,
Franklin County, ss:

Court of Appeals.

No. 737.

GEORGE S. HAWKE, Plaintiff in Error,

v.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant in Error.

1919, October 29. Petition in Error filed—Issuance and service of summons waived and appearance of defendant entered,
" " 29. Transcript of docket and journal entries filed, (6) Original papers filed as follows, to-wit: Petition, amended petition, demurrer and memorandum, demurrer and memorandum to amended petition, summons and 1 entry,
" " 30. Judgment affirmed as per entry..... 2–71
" " 30. Mandate issued as per entry..... 3–631

16 In the Court of Appeals, Franklin County, Ohio.

No. 737.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, Secretary of the State of Ohio, Defendant in Error.

Entry of Affirmance.

(Filed Oct. 30, 1919.)

This cause came on to be heard upon the petition in error, the transcript of the docket and journal entries, and the original papers and pleadings from the Court of Common Pleas of Franklin County, Ohio, and was by counsel submitted to the Court; on consideration whereof, the court finds there is no error on the record in said proceedings and judgment.

It is therefore considered by the Court that the judgment aforesaid be, and the same is hereby affirmed; and that the defendant in error recover from the plaintiff in error his costs herein expended, taxed at $—. And the Court being of the opinion that there was reasonable ground for proceeding in error no penalty is allowed.

It is further ordered that a special mandate be sent to the Court of Common Pleas of Franklin County, Ohio, for execution upon this judgment.

To which ruling and judgment of the court in affirming the aforesaid judgment of the Court of Common Pleas of Franklin County in sustaining said demurrer and dismissing said amended petition of the plaintiff in error at his costs, the plaintiff in error excepts.

17 THE STATE OF OHIO,
Franklin County, ss:

I, Guy R. Winegardner, Clerk of the Court of Appeals, in and for said county, do hereby certify that the foregoing is a true transcript of the docket and journal entries of said court in the above entitled cause, and I further certify, that the papers herewith sent, numbered from one up to — are all the original papers and pleadings filed in the above cause of George S. Hawke, plaintiff, against Harvey C. Smith, Secretary of the State of Ohio, defendant.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court of Appeals at the Court House, in Columbus, Ohio, on this 8th day of November, A. D. 1919.

[SEAL.] GUY R. WINEGARNER,
Clerk.

By A. EGOLD,
Deputy.

18 In the Court of Appeals, Franklin County, Ohio.

No. 737.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, Secretary of the State of Ohio, Defendant in Error.

Petition in Error.

(Filed Oct. 29, 1919.)

Plaintiff in error says that at the October term, 1919, of the Court of Common Pleas of Franklin County, Ohio, to-wit: on the twenty-fifth day of October, 1919, defendant in error recovered a judgment by the consideration of said court, against plaintiff in error, in an action then pending therein, wherein plaintiff in error was plaintiff and defendant in error was defendant, a transcript of the docket and journal entries, together with the original papers in said action are filed herewith.

There is manifest error in said record and proceedings to the prejudice of plaintiff in error in this, to-wit: Said Court of Common Pleas erred in sustaining the demurrer of defendant in error to the amended petition of plaintiff in error and in dismissing said amended petition of plaintiff in error at his costs.

Plaintiff in error therefore prays that said judgment of the Court of Common Pleas may be reversed and that he be restored to all things he has lost by reason thereof.

GEORGE S. HAWKE,
Attorney for Plaintiff in Error.

Waiver and Entry of Appearance.

Issuance and service of summons in error is waived and appearance of defendant in error hereby entered this 29 day of October, 1919.

JOHN G. PRICE,
Att'y Gen.,

B. W. GEARHEART.
Attorneys for Defendant in Error.

19 *Transcript of Docket and Journal Entries—Court of Appeals.*

STATE OF OHIO,
Franklin County, ss:

Common Pleas Court.

No. 81004.

GEORGE S. HAWKE, Plaintiff,

v.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant.

1919, October	9.	Petition, affidavit and precipe filed.
" "	9.	Summons issued Sheriff Franklin County, Ohio, returnable October 20. Answer Nov. 8, 1919.
" "	15.	Demurrer and memorandum filed.
" "	20.	Amended petition filed.
" "	23.	Demurrer to amended petition filed.
" "	25.	Demurrer sustained. Exceptions. Cause dismissed and at plaintiff's costs. Exceptions, as per entry.

198-611.

20 In the Court of Common Pleas of Franklin County, Ohio.

No. 81004.

GEORGE S. HAWKE, Plaintiff,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant.

Entry.

(Filed Oct. 25, 1919.)

This day this cause coming on for hearing and it appearing to the court that pending the hearing of the demurrer to the original petition plaintiff filed his amended petition and the defendant has demurred thereto, and by agreement of the parties said cause is now submitted upon the said demurrer to said amended petition;

The court, coming on to consider said demurrer and being fully advised, does find that the same is well taken and should be sustained, to which finding and ruling the plaintiff excepts; and thereupon, the plaintiff not desiring to plead further,

It is ordered and adjudged that said cause be dismissed and that defendant recover from plaintiff his costs herein, taxed at $—, to which order and judgment the plaintiff excepts.

21 THE STATE OF OHIO,
Franklin County, ss:

I, Guy R. Winegardner, Clerk of the Common Pleas Court, in and for said county, do hereby certify that the foregoing is a true transcript of the docket and journal entries of said court in the above entitled cause, and I further certify, that the papers herewith sent, numbered from one up to — are all the original papers and pleadings filed in the above cause of George S. Hawke, plaintiff, against Harvey C. Smith, Secretary of the State of Ohio, defendant.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Common Pleas Court, at the Court House, in Columbus, Ohio, on this 27th day of October, A. D. 1919.

[SEAL.] GUY R. WINEGARNER,
Clerk,

By A. EGOLD,
Deputy.

22 Court of Common Pleas, Franklin County, Ohio.

No. 81004.

GEORGE S. HAWKE, Plaintiff,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant.

Amended Petition.

(Filed Oct. 20, 1919.)

Plaintiff is a citizen and elector of the State of Ohio, and as a taxpayer and elector of the County of Hamilton he brings this action on behalf of himself and other- similarly situated. The defendant is the duly elected, qualified and acting Secretary of the State of Ohio.

Plaintiff says that on September 13, 1919, there was filed with the defendant, as Secretary of the State of Ohio, a referendum petition purporting to be signed by electors of Ohio, in the following words:

"To the Secretary of State of Ohio:

We, the undersigned, electors of the State of Ohio and of the County above named, respectfully order that House Joint Resolution No. 70, the full text of which is hereinafter set forth, adopted by the General Assembly of Ohio June 16, 1919, ratifying a proposed amendment to the Constitution of the United States of America providing what is generally known as Woman Suffrage in the United States and the several states, shall be submitted to the electors of

the State of Ohio, for their approval or rejection, at the next succeeding regular or general election occur-ing subsequent to sixty days after the filing of this petition."

The full text of the House Joint Resolution No. 70 is as follows:

Joint Resolution

Ratifying the proposed amendment to the Constitution of the United States entitled: Proposing an amendment to the Constitution extending the right of Suffrage to women."

Whereas, Both houses of the sixty-sixth Congress of the United States of America, at the first session of such Congress, by a constitutional majority of two-thirds of each house, made a proposition to amend the constitution of the United States of America in the following words, to-wit:

Sixty-sixth Congress of the United States of America at the First Session.

23 Begun and held at the City of Washington on Monday, the nineteenth day of May, one thousand nine hundred and nineteen.

Joint Resolution

Proposing An Amendment to the Constitution Extending the Right of Suffrage to Women.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein):

That the following article is proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several states.

'Article —.

'The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.'

'Congress shall have power to enforce this article by appropriate legislation.'

Therefore, be it Resolved by the General Assembly of the State of Ohio:

That the said proposed amendment to the Constitution of the United States of America be, and the same is hereby ratified; and be it further

Resolved, That the Secretary of the State of Ohio be, and he is

hereby directed, to furnish the governor of the state a certified copy of this resolution, as soon as the same has been filed in the office of such secretary of state, to be by the governor forwarded to the secretary of state of the United States as evidence of such ratification."

Plaintiff says that on June 16th, 1919, the foregoing House Joint Resolution No. 79, known as the Woman Suffrage amendment, was adopted by the 83rd General Assembly of Ohio, and was filed in the office of the Secretary of State on June 18, 1919.

That said referendum petition purports to be filed under the provisions of the Constitution of Ohio adopted at the General Election in November, 1918, as follows: (Sec. 1 and 1*a* of Art. 2.)

"Be it resolved by the people of the State of Ohio: The people also reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States.

"No such ratification shall go into effect until ninety days after it shall have been adopted by the General Assembly. When a petition signed by six percentum of the electors of the State, as is provided for a referendum on laws passed by the General Assembly, shall have been filed with the Secretary of State within ninety days after said ratification, by the General Assembly, ordering that such ratification be submitted to the electors of the State for their approval or rejection, the Secretary of State shall submit to the electors of the State for their approval or rejection said ratification in the manner provided for the submission by referendum of a law passed by the General Assembly, and said action of the General Assembly ratifying the said amendment to the Constitution of the United States shall not go into effect until and unless approved by a majority of those voting upon the same. All the provisions of this Article on the subject of the referendum upon laws passed by the
24 General Assembly shall apply hereto, so far as the same are applicable, except that the General Assembly may not declare its ratification of a proposed amendment to the Constitution of the United States an emergency act not subject to the referendum."

Plaintiff says that said recently enacted provision of the Ohio Constitution is unconstitutional in that it is in conflict with the Constitution of the United States which provides in Article 5 the manner in which amendments may be made to the Federal Constitution as follows:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Convention in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the year One Thousand Eight Hundred and Eight shall in any Manner

affect the first and fourth clauses of the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Plaintiff says that the Constitution of Ohio can not impose any limitation upon the ratification of amendments to the Constitution of the United States.

Plaintiff says that the said referendum petition now on file with the defendant is void and of no effect and can not submit any question to be decided by the electors of Ohio at the general election to be held in November, 1920.

Plaintiff says that the defendant will unless restrained by this Court, proceed to spend large sums of money out of the public funds of the State of Ohio in preparing and having printed form of ballots for the submission of said proposal to the electors at the general election to be held in November, 1920, and in preparing, having printed and mailed to the electors of the State, arguments for and against said proposal; which said expenditure will be a waste and misuse of the public funds of the State because said election cannot decide anything upon a proposal which cannot be legally submitted and which, if carried, would be without effect.

Plaintiff says that the provisions of the Constitution of the State of Ohio for a referendum are repugnant to the provisions of the Ordinance of 1787 providing for a republican form of government in the states to be formed in the territory of the United States northwest of the river Ohio.

That the provisions of the constitution of the State of Ohio for a referendum are repugnant to and violate the right to a republican form of Government which is imposed under the provisions of Article V of the Article of Compact embodied in the provisions of the said Ordinance of 1787.

That the referendum provided by the Constitution of the State of Ohio is in contravention of a republican form of government in that government by the people directly is the attribute of a pure democracy and is subversive to the principles and provisions of the said Ordinance of 1787.

That the provisions of said Ordinance of 1787 presupposes in each state to be formed in said northwest territory the maintenance of a republican form of government and the existence of state legislatures, to-wit:—representative assemblies having the power to make the laws; and that in each state the powers of government will be divided into three departments; a legislative, an executive and a judiciary. One of these, the legislative department, is destroyed by the provisions of the Ohio Constitution for a referendum.

That the provisions of the Ohio constitution for direct legislation, providing for a referendum violates the provisions of the Deed of Cession of 1784 from the State of Virginia to the United States of the said northwest territory.

That the provisions of the Ohio Constitution for direct legislation, providing for a referendum violates the provisions of the Vir-

ginia Act of Ratification of 1788 ratifying the Act of Congress in accepting the cession to said territory.

That the provisions of the Ohio Constitution for direct legislation, providing for a referendum violates the provisions of the Enabling Act of Congress authorizing Ohio to elect representatives to form a constitution or frame a government, which provides for a republican form of government, and one not repugnant to the provisions of the Ordinance of 1787.

That the provisions of the Ohio Constitution for direct legislation, providing for a referendum violates the provisions of our form of government as provided for in said Enabling Act and accepted by the people of the State of Ohio as contained in the preamble to the Ohio Constitution of 1802.

That the provisions of the Ohio Constitution for direct legislation, providing for a referendum violates the provisions of the Act of Congress of 1803 recognizing Ohio as a State and ratifying the adoption of the constitution and form of government provided for in the preamble of the Constitution of Ohio of 1802.

That the provisions of the Ohio Constitution for direct legislation, providing for a referendum, are violative of the provisions of the Articles of Compact contained in the said Ordinance of 1787 in that the same have not been accepted by the United States and have not been ratified by the Congress of the United States, and, therefore, have not been adopted by the common consent provided in Section 14 of said Ordinance of 1787.

Plaintiff says that he has no adequate remedy at law.

Wherefore, Plaintiff prays that the defendant, Harvey C. Smith, as Secretary of the State of Ohio, be enjoined from spending any money out of the public funds of the State of Ohio in preparing and having printed forms of ballot for the submission of the said referendum on said act of said General Assembly, and from spending any money out of the public funds of the State for the purpose of preparing, printing and mailing to the electors of the State arguments on said referendum proposal; and from submitting said proposal to the electors at the election to be held in November, 1920, and for such other relief as may be proper.

26 STATE OF OHIO,
County of Hamilton, ss:

George S. Hawke being first duly sworn, says that he is the above named plaintiff and that the facts stated in his foregoing amended petition are true.

GEORGE S. HAWKE.

Subscribed and sworn to before me this 18th day of October, 1919.

[NOTARIAL SEAL.] C. B. SMITH,
Notary Public, Hamilton Co., O.

27 In the Court of Common Pleas of Franklin County, Ohio.

No. 81004.

GEORGE S. HAWKE, Plaintiff,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio, Defendant.

Demurrer to Amended Petition.

(Filed Oct. 23, 1919.)

The defendant demurs to the amended petition herein, upon the following grounds:

(1) The facts alleged in said petition are not sufficient to constitute a cause of action.

(2) The court has no jurisdiction of the subject matter.

JOHN G. PRICE,
Attorney General;

B. W. GEARHEART,
Special Counsel,
Attorneys for the Defendant.

Memorandum.

Plaintiff, since defendant filed his demurrer to the original petition, has amended and made the additional claim that the referendum provision in question contravenes the provision of the ordinance of 1787. We might say that this same question was made by a brief filed by J. C. Nicholson, Esq., in the case of Hawke vs. Smith, No. 79495, when it was pending in the Supreme Court. That
28 court, therefore, had before it the question which the plaintiff now makes and must have decided it adversely to his contention.

We further refer to the short memorandum furnished with our first demurrer.

Respectfully submitted,

JOHN G. PRICE,
Attorney General;

B. W. GEARHEART,
Special Counsel,
Attorneys for the Defendant.

29 *Certificate of Lodgment.*

SUPREME COURT, STATE OF OHIO, *ss:*

I, Frank E. McKean, Clerk of said Court, do hereby certify that there was lodged with me as said Clerk on the 11th day of November, 1919, in the case of George S. Hawke, plaintiff in error, against Harvey C. Smith, Secretary of the State of Ohio, defendant in error—

1. The original bond, a copy of which is herein set forth.

2. Two copies of the writ of error as herein set forth, one for the defendant in error and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court at my office in Columbus, Ohio, this 11th day of November, A. D. 1919.

[Seal The Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio,
By SEBA H. MILLER,
Deputy Clerk.

30 Supreme Court of the State of Ohio.

No. 16447.

GEORGE S. HAWKE, Plaintiff in Error,

v.

HARVEY C. SMITH, as Secretary of the State of Ohio,
Defendant in Error.

Authentication of Record.

STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing petition for writ of error, assignment of errors, order allowing writ of error, writ of error, waiver of citation and precipe are the original papers filed in this court in the above entitled cause; that the copy of the bond hereto attached is a true copy of the bond filed in said cause; that the typewritten copies of pleadings and transcripts from the Court of Appeals and Common Pleas Court are true copies of the original pleadings and transcripts filed in said cause and that the foregoing constitutes a true and complete transcript of the record in said cause; that the foregoing transcript of docket and journal entries is truly taken and

correctly copied from the records of said Court; and that no opinion was rendered by the court in said cause.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio, this 11th day of November, A. D. 1919.

[Seal The Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1919.

No. 601.

George S. Hawke, Plaintiff in Error,
vs.
Harvey C. Smith, Secretary of State of Ohio.

In Error to the Supreme Court of Ohio.

MOTION TO ADVANCE.

The plaintiff in error and the defendant in error join in this motion to advance for early hearing the above entitled case, which is in all respect similar to case No. 582, except that it involves the proposed Equal Suffrage Amendment of the Constitution of the United States. It is requested that the two cases be heard together.

Respectfully submitted,
John G. Price, Attorney General of Ohio,
B. W. Gearheart, Special Counsel,
Lawrence Maxwell, Of Counsel,
Counsel for Defendant in Error.

The plaintiff in error concurs and joins in the motion.

J. Frank Hanly,
George S. Hawke,
Arthur Hellen,
Counsel for Plaintiff in Error.

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JAMES D. MAHER,
CLERK.

No. 601. **OCTOBER TERM, 1919.**

IN THE

Supreme Court of the United States

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, as Secretary of the State of Ohio.

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PLAINTIFF IN ERROR.

SHIPPEN LEWIS,
WILLIAM DRAPER LEWIS,
GEORGE WHARTON PEPPER,
Amici Curiae.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919. No. 602.

George S. Hawke, Plaintiff in Error,

vs.

Harvey C. Smith, as Secretary of the State of Ohio.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PLAINTIFF IN ERROR.

We appear in this proceeding as counsel for the National Woman's Party, a large organization of women from many parts of the country

whose purpose is to secure nation-wide woman suffrage by means of an amendment to the Constitution of the United States.

We ask leave to file this brief as *amici curiae* because a correct determination of the question involved is of great importance to the public in general and to our clients in particular. Until this Court shall decide that question a period of uncertainty will always attend the supposed adoption of an amendment to the Constitution of the United States.

The legislature of Ohio has unconditionally ratified the Nineteenth Amendment to the Federal Constitution. In accordance with the direction of the legislature, the Secretary of State of Ohio has certified the fact of ratification to the Secretary of State of the United States. Thereafter there has been filed with the Secretary of State of Ohio a petition asking for the submission of the legislature's action to a popular referendum. Such a referendum is expressly provided for by the Ohio State Constitution. The appellant has prayed for an injunction to restrain the spending of public money in holding the proposed election on the ground that the election can produce no legal effect because of the provisions of Article V of the Constitution of the United States. The Supreme Court of Ohio has refused the prayer and the case is now before this Court on writ of error.

Before considering the case upon the merits it is necessary to discuss the question of jurisdiction, and this question resolves itself into two

inquiries: (1) Is the subject-matter of the controversy justiciable? and (2) If it is justiciable, has this Court jurisdiction?

A. QUESTION OF JURISDICTION.

1

The Question here Presented is Justiciable.

It may be argued that the question here presented is not judicial but political in character; that it is for the legislative or executive branch of the Government to determine as a political question whether or not a state has ratified a federal amendment; or in the alternative that it is for each state to determine as a political question whether or not it has ratified a federal amendment.

This is a serious argument and deserving of the most careful consideration.

It will be well in the first place to distinguish the case at bar in this respect from those cases in which this Court has declared the guarantee to each state of a republican form of government to be a guarantee enforceable by the executive and not by the judiciary. In those cases the ultimate question presented is this: Is the *de facto* government of a given state a real government, or are all its supposed acts, executive, legislative and judicial, in fact utterly void?

In such cases as Luther *vs.* Borden, 7 How. 1, and Pacific States Telephone & Telegraph

Company *vs.* Oregon, 223 U. S. 118, this Court has declared that question to be political and not judicial. And such a decision was necessary, because to hold otherwise would lead to this conclusion: That the Court could, by declaring that no lawful State government existed, create a condition of anarchy and chaos which it had no machinery to cure. By deciding that the question of the existence or non-existence of a lawful state government was a question for Congress and the President, the Court placed the responsibility of decision upon those departments of the government which were competent to meet the practical results consequent upon that decision.

If in the case at bar the question were presented whether or not the legislative body which ratified this amendment was in fact the legislature of Ohio that would be a political and not a justiciable question. But there is here no dispute as to that question. Admitting that the lawfully constituted legislature of Ohio has unconditionally ratified the Nineteenth Amendment, the Supreme Court of Ohio has declared that this unconditional ratification may be subjected to the operation of a referendum. Thus the question presented to this Court is not of the existence or non-existence of any government or department of a government. It is simply the question of the construction of certain words in the Constitution, as applied to the exercise of a federal function by a department of a state government whose lawful existence no one disputes.

There is a further distinction between this case

and such cases as Luther *vs.* Borden and the Pacific Telephone case. There the Court refused to interfere with the domestic concerns of a state and held that only Congress or the executive was privileged to interfere in order to maintain a republican form of government and in order to overcome domestic violence. The Constitution carefully avoids the prescription of any machinery of state government, except in so far as such machinery may be necessary to discharge federal functions expressly imposed by the Constitution itself. For this reason the Court will not and cannot undertake to require what the Constitution does not require.

But in the instant case, the question is not as to the machinery of state government; it is as to the method by which a state may participate in the discharge of a federal function. By assuming jurisdiction this Court will not interfere with the domestic concerns of a state; it will merely decide for the United States as a whole whether or not the thing done by a state legislature in response to a proposal by Congress amounts to a ratification of a federal amendment under the provisions of Article V of the Constitution of the United States.

To decide that the question at issue is a political and not a judicial question is to leave its determination either to Congress, or to the President or to the several States. If it be for Congress to determine whether the constitutional method of ratification has been followed, then Congress can at any time amend the Constitution by de-

claring that three-fourths of the states have ratified a proposed amendment, irrespective of whether any state has in fact ratified. If it be for the President, he may in like manner amend the Constitution without the consent of any state. If it be for the states, then each state may substitute its own method of ratification for that provided in Article V, without the possibility of any revision of such action.

The Supreme Court of the United States is the only body which can on the one hand prevent the Constitution from being amended at the will of the Federal Government and on the other hand prevent each state from abandoning the method of amendment required by Article V. The responsibility thus imposed upon the Court is admittedly heavy, but it is no heavier than the responsibility necessarily assumed in passing upon the validity of a state statute, and it is not different in kind from that responsibility.

With respect to the justiciable character of the question presented, this case is similar to McPherson *vs.* Blacker, 146 U. S. 1, and Ohio *ex rel* Davis *vs.* Hildebrant, 241 U. S. 565. In each of those cases the Court took jurisdiction, although in each there was an argument for declaring the question political rather than judicial identical with the argument which may be presented in the case at bar.

In McPherson *vs.* Blacker, the Republican nominees for presidential electors prayed the Supreme Court of Michigan to declare void an act of the legislature providing for the election of

presidential electors by districts and to direct its mandamus to issue to the Secretary of State of Michigan commanding him to notify the sheriff of each county, in accordance with the provisions of a prior act, that at the next general election there would be chosen a single group of electors for the whole State.

The Supreme Court of Michigan denied the mandamus. Upon writ of error to this Court it was argued by the defendant in error that the subject-matter of the controversy was non-justiciable because the decision of the Court would be subject to review by political officers and agencies. It was pointed out that the determination as to who was elected to the office of elector rested in the first instance with the board of state canvassers, in the next instance with the legislature in joint convention, in the third instance with the governor, and in the last instance with both houses of Congress. In none of these four instances could the action taken be subject to judicial review.

Mr. Chief Justice Fuller disposed of this argument in these words (page 23):—

> "It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a presidential elector are political in their nature; that the Court has no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies, as the state board of canvassers, the legislature in joint

convention, and the governor, or, finally, the Congress.

"But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such Constitution and laws, and its validity was sustained. Boyd *vs.* Thayer, 143 U. S. 135. And it matters not that the judgment to be reviewed may be rendered in a proceeding for mandamus. Hartman *vs.* Greenhow, 102 U. S. 672.

"As we concur with the State Court, its judgment has been affirmed; if we had not, its judgment would have been reversed. In either event, the questions submitted are finally and definitively disposed of by the judgment which we pronounce, and that judgment is carried into effect by the transmission of our mandate to the State Court.

"The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the State as revised by our own."

The justiciable character of the question here in controversy is much more evident than in McPherson *vs.* Blacker. There the final determination of the matter lay with political agencies by necessary implication from the language of the Constitution. Here there is nothing in the Con-

stitution to indicate that either Congress or the executive is to have a voice in determining whether a Federal amendment has or has not been ratified.

In Ohio *ex rel* Davis *vs.* Hildebrant, an elector of Ohio prayed for a mandamus commanding the state election officers to disregard a negative referendum vote upon a redistricting act and to discharge their duties in accordance with the statute which had been so disapproved by the people. The Supreme Court of Ohio denied the mandamus. Upon writ of error to this Court, it was argued that the act in question was contrary to Article I, Section 4, of the Constitution, which provides:—

> "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to places of choosing senators."

Here again there was a stronger argument against the justiciable character of the controversy than is presented in the case at bar, because the final decision as to the elections, returns and qualifications of members of Congress is by Article I, Section 5, of the Constitution, laid entirely upon Congress. The Court might conceivably have taken the position that it could not interfere to compel or prevent an election, because the validity of an election could be settled only by Congress after it had been held.

But the Court considered the case on the merits as one which presented a judicial question and decided that Article I, Section 4, of the Constitution and the Act of Congress passed in pursuance thereof did allow for the operation of a state referendum.

2

THIS COURT HAS JURISDICTION.

It cannot be doubted that there is a federal question here which gives this Court jurisdiction. The appellant is a citizen and taxpayer of Ohio and he seeks to restrain the spending of public money in holding a proposed election for the ratification or rejection by the people of the action of the state legislature on the ground that such an election can have no effect on account of Article V of the Constitution of the United States, which he alleges makes the action of the legislature final. The State Supreme Court impliedly recognized the right of the plaintiff under the laws of Ohio to obtain the relief requested but dismissed the bill solely upon the ground that there was no conflict between the State Constitution and Article V of the Federal Constitution. There was no opinion, but reference was made (Transcript, page 8), to the opinion in Hawke *vs.* Smith (Transcript in that case, page 10), a case which is here argued with the instant case and is docketed as No. 582, October Term, 1919.

The case therefore falls exactly within the language of Section 237 of the judicial code,

which gives this Court jurisdiction to review "a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of * * * an authority exercised under the United States and the decision is against their (its) validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution * * * of the United States, and the decision is in favor of their validity." The appellant under the clauses quoted from the judiciary act is a proper person to draw in question the validity of the authority exercised under the United States by the legislature of Ohio and the validity of the state constitutional provision. It is not necessary for him to show that he claims directly any right, title, privilege or immunity under the Federal Constitution, laws or treaty, in order to bring this case within the jurisdiction of this Court.

In McPherson *vs.* Blacker, 146 U. S. 1, this exact question was raised and decided. In that case the appellants were the nominees of the Republican State Convention of Michigan for presidential electors and as such had demanded of the Secretary of State of Michigan that he send notices to the sheriff of each county in accordance with a law of the state providing for the election of presidential electors at large. The Secretary of State refused to comply with their demand on the ground that the election would be

conducted in accordance with the later act of 1891, which provided for the election of presidential electors by districts and in effect repealed the earlier act. The appellants filed a petition for mandamus in the State Court asking that the act of 1891 be declared unconstitutional as repugnant to Article II, Section 2, of the Federal Constitution.

The Supreme Court of the State took jurisdiction, considered the federal questions raised and decided that the act of 1891 was valid and on that ground denied the writ. Upon error to this Court it was argued that since the appellants claimed no right, title, privilege, or immunity under the Federal Constitution or laws and since their right to a mandamus depended solely upon local law the Court had no jurisdiction. This contention however was not adopted, but the Court took jurisdiction and through Mr. Chief Justice Fuller said:—

> "The Supreme Court of Michigan held in effect that if the act in question were invalid the proper remedy has been sought. In other words, if the Court had been of opinion that the act was void, the writ of mandamus would have been awarded."

In State of Ohio *ex rel* Davis *vs.* Hildebrant, 241 U. S. 565, Davis, as a citizen and elector of Ohio, filed a petition for a writ of mandamus against the Secretary of State to compel him to comply with an act of the legislature which provided for redistricting the state for congressional

elections. The act in question, though enacted by the legislature, had been rejected on a referendum election. It was contended that under Article I, Section 4, of the Constitution of the United States, the act of the legislature in such cases was not subject to referendum. The State Court considered the federal question and denied the mandamus. On appeal to this Court the federal question was considered, though neither Davis nor the State of Ohio claimed any right, title, privilege or immunity under federal law.

It is, of course, a possible view that the federal question clearly disclosed by this record will not be considered until after the popular vote and after a majority of electors shall have voted against ratification and, even then, only in case ratification by three-fourths of the states depends upon the action of Ohio. In that double contingency a question would be certain to arise directly involving the right of a woman to vote for presidential electors in Ohio or elsewhere and the ultimate decision of her right to vote would rest with this Court.

But if this Court could decide the question then on the ground that it is essentially a federal question, it may take jurisdiction and decide it now. The question is no less a federal question because it arises by anticipation rather than after the event. As a matter of equity jurisdiction it is indeed true that a chancellor will not usually decide abstract questions before they arise; but not only is this a matter in which this Court will probably

defer to the Supreme Court of Ohio but here there is a special and compelling reason for settling a great question of government before the situation has grown more complicated than it is already. If the people of Ohio are permitted to vote, and if they vote against ratification, a subsequent decision by this Court that the action of the General Assembly had been final would necessarily array the federal judiciary against the expressed will of the people. This is a contingency well worth guarding against. While the judiciary should hesitate to interfere with the holding of an election by the executive department of a government when the worst that could happen is that the election might prove futile, there should be no hesitation to decide upon the legality of any election in advance if by so doing an unseemly conflict can be avoided between departments of the same government or between the people of a state and the judiciary of the nation.

At the date of the writing of this brief the legislatures of thirty-two states, four less than the number required for adoption, have ratified the Nineteenth Amendment. In at least five of these, in addition to Ohio, there are referendum provisions. The right of women to vote will very probably be claimed at the coming spring primaries or at the presidential election in November. If, when the right is claimed, there are still six states whose referendum provisions make its existence doubtful, a situation will arise in which great uncertainty will exist as to a matter of

grave national importance. The decision of this Court in the case at bar is the only sure way to prevent such a situation from arising.

B. ARGUMENT ON THE MERITS.

We turn now to a consideration of the merits of the case, which must be determined by the following language of Article V of the Constitution of the United States:—

> "The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress; provided, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate."

By this article Congress and Congress alone, is permitted to choose between two possible methods of ratification, one by the legislatures of three-fourths of the several states and the other by conventions in three-fourths thereof. In the case at bar it has chosen the first of these two

methods. There is no doubt but that the people of the State of Ohio intend to control the ratifying power of their legislature by subjecting the exercise of that power to the operation of a referendum.

Can the will of the people of Ohio be effectuated?

If it cannot, it is because the Constitution of the United States requires each state to create certain machinery in order to exercise its right to participate in the adoption of amendments, and does not permit the states to control the operation of that machinery after it has been created.

It is our contention that the states are put in this position by the provisions of Article V of the Constitution.

To answer completely the questions involved in this contention it is necessary to consider:—

1. What the word "legislatures" in Article V is intended to mean.

2. Whether Ohio has a legislature within this meaning.

3. Whether that legislature has ratified the Nineteenth Amendment to the Constitution of the United States.

4. Whether the State of Ohio can restrict the power of ratification.

We approach these questions in the order indicated.

I.

"Legislatures" in Article V means representative legislative assemblies.

It is contended by those who support the validity of a referendum that "legislatures" is equivalent to "those bodies in whom the legislative power is vested." We contend that the internal evidence of the whole Constitution indicates that "legislatures" was intended to mean and can mean only representative legislative assemblies.

The word "legislature" is used in the Constitution not loosely, but with discrimination. In the original document and in the first twelve amendments it occurs ten times outside of Article V and on each occasion applies only to a representative legislative body. In six of these cases there has been, and can be, no argument on the matter whatever; unless the word has its primary, popular and technical meaning it has no meaning at all:—

(1) Article I, Section 2. The qualifications of electors of Congressmen shall be those "requisite for electors of the *most numerous branch of the state legislature.*"

(2) Article I, Section 3. Senators from each state shall be "*chosen by the legislature thereof.*"

It was universally admitted that it was necessary to amend the Constitution in order to elect

senators by popular vote. No one, so far as we are aware, seriously suggested that a state constitution could compass the same end by subordinating the action of the legislature to the direct action of the voters.

(3) and (4) Article I, Section 3. In the same section the governor of a state is given power to fill a senatorial vacancy "*during the recess of the legislature*," by a temporary appointment "*until the next meeting of the legislature*."

(5) Article IV, Section 4. The United States shall protect every state against domestic violence "*on application of the legislature, or of the executive (when the legislature cannot be convened)*."

(6) Article VI. "*The members of the several state legislatures*" shall be bound by oath or affirmation to support this constitution.

In addition to these, there are four other instances in which the original instrument refers to the state "legislatures." In two of these four, the meaning of the word has not received judicial construction:—

(7) Article I, Section 8. Congress shall exercise exclusive jurisdiction "over all places purchased *by the consent of the legislature of the state in which the same shall be*."

(8) Article IV, Section 3. No new states shall be carved out of old states "*without the consent of the legislatures of the states concerned*."

Two of this group of four instances have caused litigation in this Court involving a question closely related to the question in the case at bar:—

(9) Article I, Section 4. "The times, places and manner of holding elections for senators and representatives, shall be *prescribed in each state by the legislature thereof;* but the congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

In Ohio *ex rel* Davis *vs.* Hildebrant, 241 U. S. 565, this Court assumed that until Congress provided otherwise only a representative legislative assembly could prescribe the times, places and manners of holding the elections indicated.

(10) Article II, Section 1, Clause 2. "Each state shall appoint, *in such manner as the legislature thereof may direct*, a number of electors * * *."

In McPherson *vs.* Blacker, 146 U. S. 1, this Court assumed that in this clause "legislature" had its usual meaning and declared that the powers of the representative assembly could not be circumscribed by the state.

All through the Constitution the word "legislature" is carefully used, and bears the meaning which is both popular and technically correct. The framers of the Constitution and of the early amendments were perfectly familiar with the term "legislative powers" and used it accurately in Article I, Section 1. It cannot be supposed that they confounded it with the word "legislature."

So, when power was intended to be reposed in the whole people of a state, and not simply in its legislature, apt words are invariably used for that purpose. Thus:—

Members of the national house of representatives shall be chosen "*by the people of the several states*," (while senators were to be chosen in each state, "by the legislature thereof)." (Article I, Section 2.)

The appointment of officers and the authority of training the militia is reserved "*to the states respectively*." (Article I, Section 8.)

"The migration or importation of such persons as *any of the states* now existing shall think proper to admit, shall not be prohibited by the Congress" before 1808. (Article I, Section 9.) This subjected the power of Congress not simply to the will of the state legislatures, but to the will of the states, however expressed, according to their several constitutions.

No state, without its consent, shall be deprived of its equal suffrage in the Senate. (Article V.)

"The powers not delegated to the United States by the Constitution, nor *prohibited by it to the states, are reserved to the states respectively, or to the people*." (Amendment, Article X.)

So also the executive authority of a state is carefully distinguished from the legislature and from the people as a whole.

"When vacancies happen in the representation from any state, *the executive authority* thereof

shall issue writs of election to fill such vacancies." (Article I, Section 2.)

When vacancies occur in a state's representation in the Senate, "during the *recess of the legislature of* any state, *the executive thereof* may make temporary appointments. (Article I, Section 3.)

A demand for the extradition of a fugitive from justice is to be made by "*the executive authority* of the state from which he fled." (Article IV, Section 2.)

And the use of constitutional conventions was expressly provided for both in Article V, dealing with amendments, and in Article VII, dealing with the ratification of the Constitution.

It appears therefore from a study of the Constitution itself that the people of a state, its executive, its legislature, and its constitutional conventions are carefully kept distinct, so that there is no possible ground for alleging that the word "legislature" was ever intended to include anything but a representative legislative body.

In the recently adopted Sixteenth Amendment the respective functions of the legislature, of the executive and of the people are set apart, and there is drawn between the legislature and the people that clear line of distinction which the appellees would have this Court erase.

When vacancies happen in a state's representation in the Senate, "the *legislature* of any *state* may empower the *executive* thereof to make temporary appointments until the *people* fill the

vacancies by election as the legislature may direct." (Article I, Section 3, paragraph 2, as amended.)

The soundness of the proposition that a legislature means of necessity a representative legislative assembly has been tested by the suggestion that if this be true it must follow that a state which abolished its representative body and legislated by initiative only, would thereby lose the power to participate in the ratification of federal amendments if the method of ratification by legislatures were selected by Congress.

Such a conclusion is logically correct and entirely sound. If a state should abolish its legislature and cease to have any representative legislative body, it would lose its ability to ratify a federal amendment where Congress chose the legislative method of ratification. A state so acting would do so with full knowledge of the consequences.

It would also lose its representatives in Congress, since there would no longer be any qualifications "requisite for electors of the most numerous branch of the state legislature." (Article I, Section 2, and Article I, Section 3, as amended.) This would be unfortunate, but still a voluntary surrender of rights.

The Federal Constitution will have to be amended before a state can abolish its legislature and still preserve its right to representation in Congress and its right to ratify an amendment submitted by Congress to the legislatures of the several states.

2

Ohio Has a Legislature Within the Accepted Meaning of that Word.

The Constitution of Ohio entrusts the legislative power of the state to the General Assembly in these words:—

> "The legislative power of the State shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided." (Article II, Section 1.)

In the provision of the Constitution of Ohio with respect to federal amendments the same distinction is preserved between the general assemby and the people. The separate existence of the representative legislative body is recognized but it is attempted to circumscribe its power by means of the referendum.

Had the Constitution of Ohio created a legislative body composed partly of the people and partly of an elected assembly there might be some doubt as to whether the state had anybody capable of participating in the ratification of a federal amendment by legislatures. But there is no such composite body in Ohio. The legislative power is vested in the general assembly in the first instance. It can only be exercised by the

people if a measure which has been proposed to the general assembly by initiative shall fail of passage by that body. The distinction between the general assembly and the people is clearly preserved, and the general assembly exactly fits that meaning of the word "legislature" which the framers of the Constitution intended.

3

THE LEGISLATURE OF OHIO HAS RATIFIED.

No one contends that the legislature of Ohio has not ratified. The Secretary of State of Ohio has certified this fact to the Secretary of State of the United States, and its truth is not open to dispute. It is contended not that ratification has not taken place, but that the State of Ohio may suspend and ultimately destroy the effect of the ratification through the operation of a referendum.

4

THE STATE OF OHIO CANNOT RESTRICT THE POWER OF ITS LEGISLATURE WITH RESPECT TO THE RATIFICATION OF FEDERAL AMENDMENTS.

It is contended by the defendant in error that since the Constitution merely provides for ratification by the legislatures of three-fourths of the several states, and does not provide for the manner of such ratification, each state may limit its own legislature in any way whatever; that the legislature, in ratifying, acts only as a state agency

and is therefore wholly subject to the power of the state; and consequently that a state may subject the act of its legislature to the operation of a popular referendum.

Whether a legislature, in ratifying a federal amendment, is bound to conform to the rules of procedure laid down by the state constitution may be a debatable question. But the question here is not a question of procedure. The Constitution of Ohio attempts to add another ratifying body to that designated by the Constitution of the United States. It says in effect: "Under certain circumstances no amendment to the Constitution of the United States shall be considered to be ratified by the legislature unless and until it shall also be ratified by the people at the polls." This is an attempt not simply to regulate the procedure to be followed by the legislature, but to limit the substantive power of the legislature by requiring the consent of another body to make effective the expressed consent of the legislature.

We submit that the state cannot impose such a limitation even upon its own legislature. To permit it would be to allow the state, rather than Congress, to choose the method of ratification to be pursued, although the Constitution gives the power of choice to Congress alone. For if a state can annex a popular referendum to the method of ratification by the legislature it can go further and annex a constitutional convention. It can provide that no resolution of the legislature shall operate to ratify a federal amendment unless and until such resolution shall be approved by a

state constitutional convention. Plainly this would vest the power of the choice of methods in the state rather than in Congress.

In two cases this Court has considered the right of a state to limit the power of its legislature with respect to the discharge of functions expressly imposed by the Constitution of the United States.

In McPherson *vs.* Blacker, 146 U. S. 1, there was considered the validity of a Michigan statute which provided for the election of presidential electors by districts instead of at large. It was contended that the statute was contrary to the provisions of Article II, Section 1, clause 2, of the Federal Constitution, which provide that "each state shall appoint, in such manner as the legislature thereof may direct, a number of electors," &c. The question was whether the state must "appoint" as a whole or whether it could act through several political agencies. The plaintiff in error argued (page 11), that appointment by the state meant, on its face, appointment by the state as a whole and that the power given to the legislature to determine how the state should appoint did not allow the legislature to deprive the state of all appointing power.

Mr. Chief Justice Fuller, in the opinion which supported the constitutionality of the statute, said (page 25):—

> "The clause under consideration does not read that the people or the citizens shall appoint, but that 'each state shall;' and if the words 'in such manner as the legislature thereof may direct,' had been omitted, it would

> seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of these words, *while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power*, cannot be held to operate as a limitation on that power itself."

In other words, the only purpose of inserting the words "in such manner as the legislature thereof may direct" was to prevent the state from circumscribing the power of its legislature.

In Ohio *ex rel* Davis *vs.* Hildebrant, 241 U. S. 565, this Court considered the validity of a state referendum upon an act of the Ohio legislature changing congressional districts. It was contended that such a referendum was precluded by Article I, Section 4, of the Constitution, which reads:—

> "The times, places and manner of holding elections for senators and representatives, shall be *prescribed in each state by the legislature thereof;* but the congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

Congress, by an act of February 7th, 1891, had continued existing districts in a state "until the legislature of such state in the manner herein prescribed shall redistrict such state." In other words, Congress had waived its power of regulation and had left that power with the state legis-

latures. But in 1911 Congress asserted its power of regulation, deprived the state legislatures of their exclusive control and provided that a state might be redistricted "in the manner provided by the laws thereof," thus delegating the power of Congress to the entire law-making authority of each state. Mr. Chief Justice White shows in his opinion (pages 568-569), that this was done for the express purpose of admitting the application of a state referendum.

When a redistricting act of the Ohio legislature was submitted to a referendum and defeated, it became necessary for this Court to decide whether the referendum was permissible under Article I, Section 4, of the Constitution of the United States. It was declared permissible on the express ground that Congress had made it so by the later act of 1911. This Court said (page 568):—

> "So far as the subject may be influenced by the power of Congress, that is, to the extent that the will of Congress has been expressed on the subject, we think the case is equally without merit. We say this because we think it is clear that Congress in 1911 in enacting the controlling law concerning the duties of the states through their legislative authority, to deal with the subject of the creation of congressional districts expressly modified the phraseology of the previous acts relating to that subject by inserting a clause plainly intended to provide that where by the state constitution and laws the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state

> legislative power for the purpose of creating congressional districts by law."

Here the Court recognized that the state could not impose upon its legislature the limitation of a referendum when the legislature was performing a duty laid upon it by the Constitution of the United States. The referendum became admissible only when Congress exercised its power under the second clause of Article I, Section 4.

When the Supreme Court of Wisconsin in 1910 sustained that state's senatorial primary law, it was upon the express ground that a legislator, in voting for a United States senator, could not be legally bound to follow the result of the primary election. (State *ex rel* Van Alstine *vs.* Frear, 142 Wis. 320.) Speaking of Article I, Section 3, of the Federal Constitution, the Court said:—

> "The Constitution unequivocally vests in the legislatures of the several states the power to elect senators. This can only mean that it is made the duty of the legislators to meet, consult, and exercise their conscientious judgments in making a choice, having in mind always that they are the agents and representatives of those who sent them and that the wishes of the people are entitled to grave consideration. But if it be the object and purpose of this law to shift the burden of, and the responsibility for, the election of United States senators from the legislature to the electorate: if our legislators are to play the parts of automatons and become mere passive instruments by and through

> whom the will of the voters is to be carried out; if to them is left the perfunctory duty of ratifying the action of the voters at the primaries, as the members of our electoral college confirm the result of a presidential election; if the electors in reality elect United States senators, instead of the legislature, then the constitutional scheme has been superseded and the spirit of the Constitution has been evaded and disregarded. Performing the empty ceremony of recording the wish of some other body is vitally different from expressing and recording independent thought and judgment" (page 346).
>
> * * * * * * *
>
> "Construing the law as imposing no legal obligation on the part of any member of the legislature to vote for his party nominee at the primary, we must assume that the legislators will vote according to their consciences and convictions, giving due weight to the advisory vote of the people, and that therefore neither the letter nor the spirit of the Constitution has been transgressed" (page 351).

The ratification of a federal amendment is a process entirely *sui generis*. In its inception, Congress acts alone, without the approval of the President. (Hollingsworth *vs.* Virginia, 3 Dall. 378.) In its completion it is universally understood that the state legislatures can act alone without the approval of their respective governors.

An examination of the original documents shows that at least seven of the legislatures which ratified the first ten amendments did so without the subsequent approval of their respective govern-

ors. Of the thirty legislatures which ratified the Fifteenth Amendment, at least fourteen did so without the subsequent approval of their respective governors.

Whether a state constitution could validly require the governor's signature to make effective the legislature's ratification of a federal amendment is a question similar to that under discussion in the case at bar, though not identical with it. Like the question now at issue it has never been decided, since no state has expressly required the approval of its governor to validate such a ratification.

The constitution of Missouri forbids the legislature to ratify an amendment to the Constitution of the United States which may impair the right of local self-government, and the constitutions of Florida and Tennessee forbid a legislature to act upon a proposed amendment unless elected after the submission of the amendment to the states. But the validity of these provisions has never been tested, so far as we are aware.

An examination of the proclamation of the Secretary of State certifying to the adoption of the Fourteenth Amendment shows that ratification by the legislatures of twenty-eight states was requisite. The concurrent resolution of Congress directing the promulgation of this proclamation recites ratification by the legislatures of twenty-nine states, two of whom had attempted to rescind their action. To make up the number of twenty-eight, it was necessary to disregard this attempted rescission. (See Cur-

tis' Constitutional History of the United States, page 658.) The necessary inference is that at least in the opinion of Congress and the Executive the ratification of a Federal amendment is not, like a statute, subject to repeal.

In a word, constitution-making is not legislation and does not follow the ordinary course of legislation.

A study of Madison's Journal and of Elliott's Debates shows that the Convention of 1787 considered carefully the method by which the new constitution should be submitted to the people. Arguments were presented in favor of submission to the legislatures and in favor of submission to conventions elected by the people. The latter was recognized as the method more likely to evoke a direct expression of the popular will, and its advocates prevailed. This appears clearly from the quotations in the able brief of counsel for the plaintiff in error.

There are no recorded debates upon the language of Article V, but it is evident that the choice between the two methods of ratification given to Congress was a compromise between the respective advocates of the two methods of submission to the States. Iredell explained the matter to the constitutional convention of North Carolina in these words:—

> "By referring this business to the legislatures, expense would be saved, and, in general, it may be presumed they would speak the genuine sense of the people. It may, however, on some occasions, be better to con-

sult an immediate delegation for that special purpose. This is, therefore, left discretionary."

To permit a referendum upon the ratification by the legislature of a federal amendment is to substitute the choice of the state as to method for the choice of Congress, in spite of the intention of those who framed and adopted the Constitution.

Respectfully submitted,

SHIPPEN LEWIS,
WILLIAM DRAPER LEWIS,
GEORGE WHARTON PEPPER.

Office Supreme Court, U. S.
FILED
FEB 25 1920
JAMES D. MAHER,
CLERK

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1919.

No. 601.

George S. Hawke, Plaintiff in Error,

vs.

Harvey C. Smith, Secretary of State of Ohio.

Error to the Supreme Court of Ohio.

BRIEF FOR DEFENDANT IN ERROR.

This case differs from No. 582, only in that it involves a referendum of the action of the General Assembly of Ohio ratifying an amendment to the Constitution of the United States proposed by the Sixty-sixth Congress extending the right of suffrage to women (R. 14, 15).

It is not thought necessary to add anything to the argument in No. 582, and it is therefore respectfully submitted upon our brief in that case that the judgment of the Supreme Court of Ohio in this case should be affirmed.

John G. Price,
Attorney-General of Ohio,
B. W. Gearheart,
Counsel for Defendant in Error.

Judson Harmon,
Lawrence Maxwell,
Of Counsel.

Office Supreme Court, U. S.
FILED
APR 22 1920
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1919.

NO. 601

GEORGE S. HAWKE,
Plaintiff in Error,

v.

HARVEY C. SMITH, AS SECRETARY OF STATE OF OHIO,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

(27356)

Decisions of State Courts in Referendum Cases.

1. Washington.
2. Ohio.
3. Oregon.
4. Maine.
5. Colorado.
6. Arkansas.
7. California.
8. Michigan.

Submitted by Plaintiff in Error.

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Indianapolis Commercial Print, Indpls.

Supreme Court of the United States

OCTOBER TERM, 1919.

GEORGE S. HAWKE,
Plaintiff in Error.
v.
HARVEY C. SMITH, AS SECRETARY OF STATE OF OHIO,
Defendant in Error.

No. 601.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

IN EXPLANATION.

For the information and convenience of the Court the Plaintiff in Error submits unofficial, but what is believed to be correct, copies of the decisions of the Supreme Courts of the several states on the question of the validity of a state constitutional provision for a referendum on the act of ratification by a state legislature of an amendment to the Federal Constitution.

1. The opinions rendered by the Supreme Courts of the States of Washington and Ohio affirming the validity of the referendum clauses in the constitutions of said states, together with the dissenting opinions filed in the causes in which said decisions were rendered.

2. Unofficial, but what is believed to be correct, copies of the opinions of the Supreme Courts of Oregon, Maine,

Colorado, Arkansas, California and Michigan holding state constitutional referendum provisions void as applied to the acts of their respective legislatures ratifying the Eighteenth Amendment to the Federal Constitution.

I.

OPINION OF THE SUPREME COURT OF WASHINGTON.

IN RE STATE OF WASHINGTON ON THE RELATION OF FRANK P. MULLEN, RELATOR, V. I. M. HOWELL, SECRETARY OF STATE OF THE STATE OF WASHINGTON, RESPONDENT, No. 15313.

Chadwick, C. J., concurred in by Justices Mount, Main and Holcomb:

At the general election held in 1912 the people of the State of Washington adopted as a principle of government the power to initiate laws and to review at the bar of popular opinion all acts, bills or laws passed by the legislature of the State of Washington.

The right so to do is emphasized as a power reserved and the terms of the amendment imply in the strongest possible way that the intention of the people was to reserve a right to review every act of the legislature which might affect the people in their civil rights or limit or extend their political liberties, for they wrote an exception, saying that a referendum may be ordered in all cases, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions. The writing of an exception specifying the things not reserved is an expression within sound rules of construction of a reservation to pass upon all things not so specified.

The court, in passing directly upon the amendment, and in other cases arising under city charters, has held firm to the principle of the referendum and has consistently refused to limit it by construction.

In December, 1917, Congress proposed an amendment (Stats. of U. S., Sixty-Fifth Congress, Sess. 11, Ch. 212, 1918, p. 1050) to the federal constitution providing that:

> Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
>
> Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.
>
> Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

It will be noted that the amendment does not pertain to matters within the original concept of the Constitution, to the definition or distribution of powers of public officers, but by its terms assumes to cover matters that are purely legislative and which have hitherto been a subject of legislation by the several states under the police power. We understand that the federal government has no power to control the police power of the states except as such power may have been expressly granted, or as it may be necessary to maintain the acknowledged powers of the federal government.

This amendment was submitted to and ratified by the legislature of the State of Washington by joint resolution passed January 13, 1919. On March 20, 1919, relator tendered a petition for a referendum to the respondent Secretary of State; he asked that it be filed and a ballot title be supplied. Respondent refused to receive it upon the grounds (a) that the amendment having been adopted by a joint resolution and not by an act, bill or law it was not within the terms of the seventh amendment, and (b) that it was not a subject for referendum under Article V of the Constitution of the United States.

Addressing ourselves to the first contention of the respondent, is the resolution an act, bill or law within the meaning of those terms as employed in our constitution; whether the people intended an act, bill or law to be statutes enacted by the legislature, or whether they meant action by the legislature which affected them as law?

No cases have been cited, and we may confidently say that there is none holding to a rule of strict construction where the power of the whole people is in question It is a rule become axiomatic by long continued reiteration that no court will hold a law to be unconstitutional unless such holding is compelled; that a law will not be held to be unconstitutional by construction, that is to say the power of the legislative body ,or the people if exercising that function, will not be abridged by the courts or suffered to be abridged by others if the thing sought to be done is within the spirit of the policy enunciated in the provision under consideration. To this end the courts of the country have so addressed themselves that without resort to the tedium of limitless authority we may well adopt the language of Judge Cooley, who was an acknowledged master in the

field of constitutional law; that constitutional provisions must be interpreted with reference to—

> The times and circumstances under which the State Constitution was formed—the general spirit of the time and the prevailing sentiments among the people. Every constitution has a history of its own which is likely to be more or less peculiar; and unless interpreted in the light of this history, is liable to be made to express purposes which were never within the minds of the people in agreeing to it. *People v. Harding,* 53 Mich. 481.
>
> The safe way is to read its (the Constitution's) language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted. *Maxwell v. Dow,* 176 U. S. 581, 602.
>
> The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty to look to the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. *Bulger v. Kansas,* 123 U. S. 623, 661.

The people, too, have directly charged us with a duty to be mindful of their sovereign rights:

> A frequent recurrence to fundamental principles is essential to the security of individual rights, and the perpetuity of free government. Art. 1, sec. 32, Const. State of Washington.

Wherefore the purpose of the people in adopting the seventh amendment is a proper subject to be considered.

Did they intend to grant any exceptions other than those enumerated in the seventh amendment? If this were an ordinary case of statutory construction we have no doubt that we could all agree that we would look first to the old law, the mischief and the remedy. It is more important in considering a question involving the first of all the sovereign rights of the citizen—the right to speak ultimately and finally in matters of political concern—that we should measure the power reserved by the former condition.

It is well known that the power of the referendum was asserted not because the people had a willful or perverse desire to exercise the legislative function directly, but because they had become impressed with a profound conviction that the legislature had ceased to be responsive to the popular will. They endeavored to, and did,—unless we attach ourselves to words and words alone, reject the idea upon which the referendum is founded and blind ourselves to the great political movement that culminated in the seventh amendment, make reservation of the power to refer every act of the legislature with only certain enumerated exceptions.

Guided by these considerations we are satisfied that the people used the words, "act, bill or law" in no restricted sense but in a sense commensurate with the political evil they sought to cure.

And why should not the amendment be a law within the meaning of the seventh amendment?. No reason is assigned other than that "law" as there used is synonymous with "bill" or "act." We may well argue and be within sound rules that if the people had so intended they would not have used the word "law" at all, as was done in the State of Oregon. We can conceive of no more sweeping law than

the proposed amendment. Certainly no amendment has ever been proposed that goes deeper into the vitals of the American idea of government. It surrenders *pro tanto* the sovereignty of the State, gives to the federal government a right to enact laws and to enforce them through the federal courts and it will deny the citizen the protection of some of those guarantees that we have written out of the travail of time into our own Bill of Rights. Upon construction we hold that the amendment to the Constitution of the United States is a law within the meaning of the seventh amendment, and is subject to referendum.

But it is contended that, whereas the legislature ratified the amendment by joint resolution instead of by act or bill as it might have done, the resolution being not *eo nomine* an act, bill or law, is not subject to a referendum. This argument defeats itself, for if we are to be literal and exact in terminology and so insistent upon "scholastic interpretation" as to admit this premise we must hold that the legislature had no power to ratify the amendment except by act or bill, for we find no power granted in the constitution to that body to act in matters legislative other than by act or bill.

This reasoning would lead to two consequences, equally absurd; either, the amendment being ratified by resolution, the act of ratification is void as a thing done in a manner not provided, or, if sustained, would permit the legislature to defeat the power of referendum by acting, in matters purely legislative, by resolution instead of by bill. The latter is the consequence in the instant case if the argument of the learned Attorney General is to be sustained. But we are not put to the extremity of holding that the legislature may not in matters of ratification act

by resolution, for there is a high road of reason leading down to a true result.

The contention that a resolution, although it may have the force and consequence of a formal legislative enactment and affect the people in their civil and political rights, cannot be referred arises from a misconception of the term. This case sounds in fundamentals, not in definitions. It is not the resolution, but the *act* of the legislature in adopting it that is to be referred. A resolution, like all acts of the legislature, is to be measured by the end accomplished. It is true that we have no provision in our constitution providing for the passage of resolutions even in the formal matters in which the legislature has through out the entire history of our territory and state been wont to act, but it is just as evident that there is no limitation upon the power of the legislature to act by resolution.

The constitutions of some of the states and the Constitution of the United States (section 7, article 1) permit or recognize the practice of acting by resolution, and some of them limit its uses. It has been held if the constitution is silent, as ours is, that legislation cannot be effected by that method.

Rogers v. Crane, 1 W. Va. 176;

State ex rel. Atty. Gen'l. v. Kinney, 56 Ohio St. 721;

Barry v. Viall, 12 R. I. 18.

And were we considering a matter involving private right arising in or out of the laws of this state we could not question the authorities just cited, but they are not applicable for the reason that the authority to act in the matter of a proposed amendment to the Constitution of the United States does not rise in or out of the constitu-

tion of the states but arises out of the federal constitution, and any act, whether it be by resolution or by bill, on the part of the state legislature must be held to be sufficient expression of the legislative will unless Congress itself challenges the method or manner of its adoption. It is upon this principle that the Supreme Court of the United States has held that the question whether the referendum does violence to the Constitution of the United States is non-justiciable, holding that the question whether it deprives the government of a state of its representative character, thus violating the guarantee of a republican form of government, is a question for Congress, and not for the courts. The power to question the manner of adoption being in Congress, and not in the courts, the contention that the legislature had no power to act by resolution is non-justiciable, but this holding does not foreclose an inquiry as to the legislative character of the thing done.

It may be that my argument is not entirely clear. If so, we may profitably resort to an illustration. The people of the State of Washington have by expression of their reserved right to legislate upon all proper subjects of legislation declared the policy of this state to be against the barter and sale of intoxicating liquor within the state, and by subsequent laws that we, as citizens of a sovereign state, are opposed to the use of intoxicating liquor by any of our citizens. The original law by its accretions has become what is popularly called in the nomenclature of the Anti-Saloon League "bone dry." This the people did of their own free will and accord and by the assertion of an hitherto unused power. Let the question occur, can their act be undone by any plan, power or authority, less or other, than the power that established the present

state of the law? Keeping in mind our present "bone dry" condition, or plight if that term be preferred, suppose the Congress of the United States should propose an amendment to the federal constitution providing that it shall hereafter be *lawful* to ship into and sell in all of the states of the Union wines and beers containing not to exceed a certain minimum of alcohol—that it has the power so to do will not be denied; then suppose that the state legislature did by resolution, as in the present instance, ratify the amendment, and that it was ratified by a sufficient number of states only, including our own, to meet the demands of the federal constitution. We would then have a law that was not a law before; that would wipe out *pro tanto* the present law; that would work such an exception to it that, so far as the policy of our citizens had been expressed by their direct vote, would defeat its purposes. In such event—and it is a reasonable postulate—would it be urged for one moment that the people of this state could be denied a right of referendum to determine for themselves under their reserved powers whether they desired their own law to be thus overcome? Would they have to stand by helplessly while the fruits of their victory were swept away and their sovereignty surrendered in degree by resolution of the legislature?

I opine that we would find some way to declare that the right to refer the matter to the people who had theretofore exercised their reserved power upon the very subject of the proposed legislation could not be thus defeated. It is no argument to say that a referendum in that event would operate to promote a good cause, while this demand comes from those who would defeat all liquor legislation. We are here to declare the law, not to maintain or defend policies, and it is enough to say that the relator is

within the law as declared by the whole people and as such his right should not in conscience be denied. We cannot fit a rule to meet a particular case; it must apply to all alike whatever the cause and whatever the character of those who invoke it.

The final and, as we believe, the principal ground of opposition is that the amendment, being submitted under Article V of the Constitution of the United States, is a federal question in the sense that state laws and state constitutions have no bearing upon or relation to the issue.

It is argued that inasmuch as Article V of the Constitution of the United States provides that a proposed amendment "shall be valid to all intents and purposes, as part of this Constitution, when ratified by the *Legislatures* of three-fourths of the several states, or by convention in three-fourths thereof," etc., the people have hitherto fixed the manner and form of ratification against which the reserved power of the people of a sovereign state may not prevail. If we are to stand upon the word "legislatures"; if that word and that alone is the Alpha and Omega of our inquiry, it follows that the controversy is at an end, but we are cited to no instances where a great question involving the political rights of a people have been met by such technical recourse; where any court has so exalted the letter or so debased the spirit of the law.

In the Oklahoma Bank case (219 U. S. 104), Justice Holmes frowned upon a like invitation, saying:

> We must be cautious about pressing the broad words of the Fourteenth Amendment to a dryly logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one

> or another of the great guarantees in the Bill of Rights. Judges should be slow to read into the latter (The Constitution of the United States) a *nolumus mutare* as against the law-making power.

It may be set down as a truism that the Congress of the United States has no concern of the manner in which the people of the several states pass upon the proposed amendment. It is the act of ratification or rejection by the legislative power in a state and not the manner of doing that makes for the result to be accomplished.

It may be true that it might have been provided that amendments could be made directly by Congress and the submission of amendments for ratification or rejection by the legislatures of the several states at all was a matter of grace upon the part of the whole people when the Constitution was adopted, but we would incline to the opinion that the right to pass upon proposed amendments should be treated as a reservation in the several states of the right to express their legislative will in the manner in which they had been provided or might thereafter provide, and, when so regarded, as a compact between the states and the federal government.

It is provided in the federal constitution that proposed amendments shall be ratified by the legislatures of the states or by conventions assembled for the purpose of considering them. It can not be urged successfully that the framers of the Constitution used the words "legislatures" and "conventions" as terms describing then present institutions, for it is well known that at the time the Constitution was adopted some of the states did not have legislative assemblies.

Article V can mean no more than this; that no amendment shall be adopted unless it is sanctioned by the su-

preme legislative power of a sufficient number of the commonwealths, whether such ratification be by legislative assembly, convention or such other method as might thereafter be adopted by the people in the several states.

If we hold that the words "legislatures" and "conventions" do not control the plain purpose and spirit of Article V; that is, that the people shall pass upon a proposed amendment by their representatives if that be the plan provided by them at the time of its submission; or, if not, under such other plan of expressing their will as may not be offensive to the federal constitution, we are on solid ground. For the framers of the Constitution had well in mind—for they had lived in that time when our political system was being fashioned into concrete form; they understood, as we sometimes forget, that—

> The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority. Cooley on Constitutional Limitations, 6th edition, page 39.

Wherefore it may be said that it is the meaning and intent of Article V that an amendment to the Constitution of the United States shall not become effective until it has been ratified by the legislative authority of a sufficient number of the states, and it should not be held that a ratification or rejection by a popular vote under the referendum clause of a state constitution would be contrary to the provisions of Article V unless it can be said under sound rules of construction that the referendum is offensive to the Constitution of the United States.

The people of several of the states, having the sovereign right of self-government, excepting only as they may have yielded that right under the Constitution of the United

States and its amendments, have adopted the referendum as a rule of government and the only objection that has ever been urged, or that could have been urged against it, is that it violates section 4, Article IV, of the Constitution guaranteeing to every state a republican form of government. The Supreme Court of the United States has held that it does not so offend.

Pacific Telephone Co. v. Oregon, 223 U. S. 118.

The fault of disassociating a word or correlative words from the text of a written law and premising a judgment without the warmth of the spirit of that law may be illustrated. If we are wrong it may well be that a state might, and withal unwittingly, put it beyond its power to pass upon a proposed amendment to the federal constitution. If the people of this state had, when they adopted the referendum, provided for the abolition of our legislative assembly (as they might have done), and had provided that all laws should thereafter be initiated by and voted upon by direct vote of the people, or that the legislative functions of the state should be exercised by a council of three and that all their acts should be subject to a referendum at the next succeeding general election, it would follow under the theory advanced to defeat a referendum in this case that a proposed amendment could not be either ratified or rejected in the State of Washington, for there would be no "legislature" or "convention" in the sense in which those terms are employed in the federal constitution.

Significance is placed on the word "conventions," it being contended that if the word "legislature" had been used alone our argument might seem plausible, but the added word "conventions" necessarily implies that Con-

gress had in mind a representative body and not legislative authority; but we are inclined to take a broader view.

It was doubtless intended that "legislatures" should mean one thing; that is, the legislative authority of the state; and "conventions" another thing, as an extraordinary representative body convened by and in the state for the sole purpose of passing upon the proposed amendment to the federal constitution. If it had no other intention in adopting the term "legislatures" in specifying one of the instrumentalities for passing upon the proposed amendment than to express the idea of legislative power, of whatever that power consists, then it must be deemed to mean all the branches or component parts of that power, which have included the qualified voters also if they so desire. Inasmuch as the Constitution was formulated not for a day or a year, but for all time except as amended, we may consider that it contemplated the same kinds of state legislative bodies then in existence and known to the framers, or any other kinds of legislative bodies that should come into existence in the future.

One of the important ideas governing the framers of the national constitution was that amendments to that instrument should be ratified by the states as units, recognizing and preserving the integrity and sovereignty of the states as parties to the compact creating and continuing that constitution. Doubtless there was no other idea prevailing in providing for adoption of amendments by the "legislatures" or conventions of three-fourths of the states than that. Certainly it was and is of no concern to the others what sort of legislature any particular state has, so long as it conforms to the scheme of a republican form of government.

We have preferred to meet the question upon the plane of broad reason, having in mind the spirit and policy of the referendum, but we are not without competent authority to prove that the manner or the name attached to the legislative power of the state, whether it be a representative body or the people themselves, is of no concern to the federal government.

In *State ex rel. Schrader v. Polley*, 25 S. D. 5, it was contended, inasmuch as it was provided in the federal constitution (Sec. 4, Art. 1) that

> The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the Legislature thereof,

that the relator was entitled to have his name go upon the ballot at a general election under an act of the legislature but against which a referendum petition had been filed. And it would seem, if the argument of the respondent is sound, that the prayer of the relator in that case should have been granted, for there the Constitution of the United States provided that the *legislature should prescribe the times, places and manner* of holding elections, while in the instant case the provision is that the amendment shall be ratified by the legislatures.

After noting the tenth amendment to the Constitution that—

> The powers not delegated to the United States, are reserved to the States respectively, or to the people,

which, by the way, is a declaration that the people of the several states may function their legislative power in their own way, especially so when the ninth amendment—

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people—

is regarded; for the right to legislate directly or by representative bodies is a right assuredly retained, and being retained may be exercised in the form and manner provided by the people of a state, the court says:

> We are also of the opinion that the word "Legislature," as used in section 4, art. 1, of the federal Constitution, does not mean simply the members who compose the Legislature, acting in some ministerial capacity, but refers to and means the lawmaking body or power of the state, as established by the state Constitution, and which includes the whole constitutional lawmaking machinery of the state. State governments are divided into executive, legislative, and judicial departments, and the federal Constitution refers to the "Legislature" in the sense of its being the legislative department of the state, whether it is denominated a Legislature, General Assembly, or by some other name. Under Sec. 1, Art. 3, of the state Constitution, it will be observed, the people of this state have reserved to themselves, as a part of the lawmaking power, the right to vote by referendum, upon any law passed by the Legislature, with certain specified exceptions, prior to the going into effect of such law. That the exceptions mentioned are "such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government or its existing state institutions." It is clear that said chapter 223 is not within any of these exceptions. Under the Constitution of this state, the people, by means of the initiative and referendum, are a part and parcel of the lawmaking power of this state, and

the Legislature is only empowered to act, in accordance with the will of the people as expressed by the vote, when the referendum is properly put in operation. The term "Legislature" has a restricted meaning which only applies to the membership thereof, and it also has a general meaning which applies to that body of persons within a state clothed with authority to make the laws (Bouvier's Law Dic., Webster's Dic., 18 Am. & Eng. Ency. 822; 25 Cyc. 182), and which, in this state, under section 1, art. 3, Const. S. D., includes the people.

In *Baldwin v. Trowbridge*, 2 Bart. Contested El. Cas. 46, the minority report in presenting the legal side of the controversy shows the following pertinent language which meets with our approval: "But it was argued that this power was by express terms left, not to the states simply, but to the Legislatures thereof, and that this is such a limitation upon the people of the states that they have not power to restrict their Legislatures in the exercise of this right, conferred upon them by the federal Constitution; but I submit, with all due respect, that not only the history and object of the section under consideration, but the proper definition of the term "Legislature" as therein used, show the fallacy of this construction. The "Legislature" of the state, in its fullest and broadest sense, signifies that body in which all the legislative powers of a state reside, and that body is the people themselves, who exercise the elective franchise, and upon their power of legislation there is no limitation or restriction, except such as may be found in the federal Constitution, or such as they themselves may provide by the organic law of the state."

The writ was denied.

State ex rel. Davis v. Hildebrant, 94 Ohio St. 154, is likewise to the point. The general assembly, being the representative legislative body of the state of Ohio, passed an act on May 27, 1915, redistricting and apportioning the state into several congressional districts. The state had theretofore by an act, passed April 28, 1913, been districted and divided. A sufficient number of the people filed a petition for a referendum of the latter act. It was submitted to the electors of the state and was rejected by a majority of the voters. It was contended that the act of 1915 was a valid act and was not a subject of referendum because Section 4, Article 1, of the federal constitution provided that the times, places and manner of holding elections for members of Congress, "shall be prescribed in each state by the Legislature thereof." The court put the question:

> Does the term "legislature," as used in Article 1, Section 4, of the Federal Constitution, comprehend simply the representative agencies of the state, composed of the members of the bicameral body, or does it comprehend the various agencies in which is lodged the legislative power to make, amend and repeal the laws of the state, including the power reserved to the people empowering them to "adopt or reject any law" passed by the general assembly under the provisions of Section 1, Article 11, of the Constitution of Ohio?

After reference to the state constitution, which is in form similar to the seventh amendment to our own, the court says:

> These various sections disclose that, while the legislative power has been delegated to the bicameral body composed of the Senate

and House of Representatives, the people of Ohio have by the aforesaid provisions of their constitution determined the manner by which such legislative power may be exercised, under what circumstances the laws passed by it may become operative without an appeal to the people, and have further imposed the conditions under which such laws may become operative or inoperative as they may have been adopted or rejected by the popular vote designated as the "referendum."

While Article 1, Section 4, of the United States Constitution, is controlling upon the states in so far as it grants the legislature of the state authority to prescribe the times, places and manner of holding elections, this is the *quantum* of the federal grant. The character of the legislature, its composition and its potency as a legislative body are among the powers which are, by Article X of said Constitution, "expressly reserved to the states respectively, or to the people."

Webster's New International Dictionary defines "legislature" as follows: "The body of persons in a state, or politically organized body of people, invested with power to make, alter and repeal laws."

The Century Dictionary defines the same term as follows: "Any body of persons authorized to make laws or rules for the community represented by them."

Under the reserved power committed to the people of the states by the federal constitution, the people, by their state organic law, unhindered by federal check or requirment, may create any agency as its lawmaking body, or impose on such agency any checks or conditions under which a law may be enacted and become operative. Acting under this recognized authority, the Ohio constitution, prior to the adoption of the amendment

of 1912, provided that the "legislative power" of the state should be vested in the general assembly, consisting of a senate and house of representatives. The same provision now exists, but by the adoption of the amendment of 1912 the people expressly limited this legislative power by reserving to themselves the power to reject any law by means of a popular referendum. The law-making body, the legislature, as defined by lexicographers, comprehends every agency required for the creation of effective laws. It cannot be claimed that the term "legislature" necessarily implies a bicameral body. When the term was originally embraced in the constitution the legislatures of Pennsylvania, Georgia and Vermont consisted of but a single house, with a second body in each, called an executive council. These states later abolished their councils and established a legislature consisting of two branches, and such is the charater generally of the various state legislature today. 1 Bryce's American Commonwealth, page 461, note.

The constitutional provision relating to the election of congressmen, conferring the power therein defined upon the various state legislatures, should be construed as conferring it upon such bodies as may from time to time assume to exercise legislative power, whether that power is lodged in a single or two-chambered body, or whether the functions of the latter be curbed by a popular vote or its enactments approved by a referendum vote .

This case went to the Supreme Court of the United States (241 U. S. 565). That court passed the question of the power of the state to adopt and use the referendum as an instrument of

legislative will, "as obvious," holding that the state law which had been made subject to the referendum was valid and operative. A conclusion manifestly unsound if the word "legislature" means a bi-cameral body and that meaning is inflexible under the Constitution of the United States, for if that were so the states would have no power to prevail against it whatever the form of their expression may have been.

But it is said that the Supreme Court may be unsound in that respect, but is sound in result because the Congress had passed an act, ch. 537, Stat. 13, making the referendum a component part of the legislative authority empowered to deal with the election of members of Congress. There is nothing in the act of Congress which

> prevents the people of a State from reserving a right of approval or disapproval by referendum of a state act redistricting the state for the purpose of congressional elections. (Syllabus.)

But if it were so it would not avail respondent, for the power of the state to act comes from the Constitution and **not** from any act of Congress. To give such effect to an act of Congress would be to say that Congress might by act amend the Constitution. Chief Jusice White disposed of the controversy when he defined the issue.

> The right to this relief was based upon the charge that the referendum vote was not and could not be a part of the *legislative* authority of the State and therefore could have no influence on the subject of the law creating congressional districts for the purpose of representation in Congress.

And said:

> The court below adversely disposed of these contentions and held that the provision

> as to referendum was a part of the legislative power of the State, * * * * . As to the state power, we pass from its consideration, since it is obvious that the decision below is conclusive on that subject and makes it clear that, so far as the state had the power to do it, the referendum constituted a part of the state constitution and laws and was contained within the legislative power, and therefore the claim that the law which was disapproved and was no law under the constitution and laws of the State was yet valid and operative is conclusively established to be wanting in merit.

It could not have been so held if the act of *legislature*, as distinguished from legislative authority, was essential under Section 4. If that were so the court must have denounced the referendum in that and all cases where the Constitution leaves a matter to the legislature and refused to follow the state court, for its first duty is to the Constitution.

Our attention is called to an unpublished decision of the Supreme Court of Oregon in *Herbring v. The Attorney General*. The premise of the decision is that the reserved power of the people is limited to a review of "any *act* of the legislative assembly," and that the word "act" was used having in mind the exercise of the legislative function as outlined in the original draft of the state constitution and that the word "act" did not comprehend a joint resolution.

We have already demonstrated that our constitution is more comprehensive. The decision does not appeal to us for another reason. Its basis is fundamentally unsound in that it proceeds upon the theory that the right of the people to legislate upon the question rests in the antece-

dent provisions of the state constitution, whereas the right comes from the Constitution of the United States.

Other questions were discussed by counsel. We have considered them and are agreed that they are not controlling.

The writ will issue.

Dissenting Opinion.

Parker, J., Justices Mitchell and Tolman concurring:

I am unable to concur in the majority opinion of the court. The necessity of a prompt disposition of this case, in view of the decision of a majority of the court to grant the writ prayed for, prevents me setting forth at the length I would like to my views upon the question presented. I will content myself with the following brief observations, which I think could be materially strengthened in support of the conclusions I have reached, by a more detailed discussion.

The resolution of congress here in question reads:

Joint Resolution.

> Proposing an amendment to the Constitution of the United States. 1. Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring there), that the following amendment to the constitution be, and hereby is, proposed to the States, to become valid as a part of the constitution when ratified by the legislatures of several states as provided by the Constitution:

Article.

Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of the several states, as provided in the constitution, within seven years from the date of the submission hereof to the states by the congress.

The constitution of the United States, in the fifth article thereof, prescribes the manner of proposing and ratifying amendments to that instrument as follows:

> The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by convention in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress.

In the Sixth Article of that instrument we also read:

> This constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or

> which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

I am convinced that the ratification by a single state legislature of a proposed amendment to the federal constitution is an exercise of a power which the legislature possess by virtue of the fifth article of that instrument and the designation by congress of that method of ratification in pursuance of the power given to congress by that article, and that the legislature is not acting in pursuance of any power given to it by the state constitution, except in so far as the legislature may owe its existence to the state constitution. I cannot escape the conclusion that such act of ratification by the legislature is not law-making legislation for the state and its people under its constitution, but is simply the casting of the vote of the state and its people in the manner prescribed by the federal Constitution and the direction of congress made in pursuance thereof, as to whether or not the proposed amendment of that instrument shall be ratified. Such act of a state legislature, it may be conceded, is an act of participation in legislation; but I think it is an act of participation in purely national legislation, and is neither state legislation, nor an act of participation in state legislation. I may further observe that the act of ratification would, as I view it, be in substance identical in character, whether done by the legislature by a vote upon an informal motion, by a formal resolution, or by a formal bill, as in the enactment of ordinary state laws; and that the form of ratification by the legislature is of no moment in the determination of whether or not the legislative act

of ratification is referable to a direct vote of the people. Of course the legislature might call for an advisory vote of the people before finally acting, but that is not this case.

In Jameson Constitutional Conventions, (4th Ed.) Section 583, that learned author says:

> The power of a state legislature to participate in amending the Federal Constitution exists only by virtue of a special grant in that constitution. It is a power which it could not assume under any notion of a general right to legislate, for that right is confined within state limits, and to the enactment of ordinary laws.

Our problem here is, what body of persons compose the legislature within the meaning of that word as used in the fifth article of the Federal Constitution rather than the question of where the whole of the state's legislative power resides. Recurring to the language of that article, and having in mind what must have been the commonly accepted meaning of the word "legislature" when originally placed in that article of the constitution, I am convinced that it means that body of persons composing the ordinary representative law-making body of the state. The fact that congress is given power to submit proposed constitutional amendments to conventions, manifestly meaning representative conventions, in the several states, as well as to the legislatures thereof; the manner in which the several states and their people express their choice for president and vice-president of the United States through chosen representatives called electors, instead of by direct vote; the manner in which the several states expressed their choice for United States senators through chosen members of their respective representative law-making bodies called "legislature," or some other name

of the same import, as provided by the federal constitution until recent years, the fact that the federal constitution, until the recent amendment thereto, providing for the election of senators by direct vote of the people, never contained any provision for the people of the respective states voicing their will by direct vote upon any Federal or National question wherein the decision of a state, or the people thereof as a whole, was called for under some provision of the Federal Constitution; and the history of the times touching the original framing and adoption of the Federal Constitution; to my mind argue all but conclusively that it was not the intent or purpose of the framers of that instrument that amendments thereto should be ratified by the several states or the people thereof, other than by an expression of their will in that behalf through their representative legislative bodies called "legislature" or some other name of the same import, or through representative conventions held in the several states for that purpose.

Counsel for the relator call to our attention and invoke in his behalf the decisions of the supreme court of South Dakota and Ohio, in *State ex rel. Schrader v. Polley, Secretary of State*, 26 S. D. 5, —— N. W. ——, and *State, ex rel, Davis v. Hildebrant, Secretary of State*, 94 O. St. 154, —— N. E. ——, holding, in substance that the word "legislature" as used in Section 4 of Article 1 of the Federal Constitution, means and comprehends the entire legislative power of the respective states, including not only the legislative power possessed by the representative legislative body of each state, but also the legislative power which may be reserved in the people of a state by its constitution, to be exercised by the initative and referen-

dum, as such power is reserved in the people of South Dakota and Ohio by their constitutions, in substance the same as such power is reserved in the people of our state by the above quoted portions of the seventh amendment to our constitution. Section 4 of Article 1 of the Federal Constitution, the interpretation of which was involved in these decisions, reads:

> The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the place of choosing senators.

The question in each of these cases was as to whether or not an act passed by the representative legislative law-making body of the state, called "legislature" in South Dakota, and "general assembly" in Ohio, dividing the state into congressional districts, and providing for the election of representatives in congress therefrom, was subject to a referendum vote of the people of the state under the initiative and referendum provision of its constitution; those courts deciding that such an act was subject to a referendum vote of the people. It seems to me at once apparent that there is a marked distinction between the legislative power reserved to the several states by the provisions of Section 4, Article 1 of the Federal Constitution, and the provisions of Article 5 of that instrument, providing the manner in which the respective states and the people shall express their ratification of proposed amendments to that instrument. The former is the enactment of law, the prescribing of a rule of conduct, by the sovereign legislative power of the state, subject, of course, to be superseded by laws which may be enacted by congress, but nevertheless within itself an act of legislation, com-

pleted or to be completed by the sole legislative power of the state; and the fact that such legislation may have to give way to some higher law which congress may enact, does not in the least change the fact that it is an act done by the legislative power of the state, in the doing of which no other state or power has any voice whatsoever. The latter is but the casting of the vote of the state and its people upon the question of amending the federal constitution, in the manner provided for by the terms of that instrument; a question not of state legislation, but of national legislation, in which each state has but one vote. I think that the South Dakota and Ohio decisions are of no controlling force in the solution of this problem.

It has been suggested that a state constitution might not create any representative law-making body such as is commonly called "legislature," but provide for the exercise of the whole of the state's legislative power by direct vote of the people, a thing I concede to be not impossible; and that such a state might decline to provide for the calling of a convention to act upon a proposal to amend the federal Constitution. I am quite unable to see, should my view of the question here presented prevail, that such a condition would in the least impair the right and power of congress to obtain in a norderly lawful way an expression of the will of the people of such a state touching a proposed amendment to the federal Constitution since congress is plainly given the power to submit such a proposal to conventions in the several states and to provide the manner of electing delegates to, and the calling of such conventions, all of which could be readily done by congress wholly apart from state constitutional and statutory law.

It is contended in behalf of the relator that the secre-

tary of state should not now be permitted to refuse to file the petition, give a serial number thereto as a referendum measure, transmit a copy thereof to the attorney general for the preparation of a ballot title and perform the other acts required of him by law looking to the submission of referendum measures to the people; and that we should not at this time entertain the defense made in the secretary's behalf that the proposed measure is not referable to the people. Counsel for the relator call to our attention and rely upon that line of decisions holding, in substance, that the courts will not entertain the question of the constitutionality or validity of a proposed initiative or referendum measure, in a proceeding to compel an officer to perform or refrain from performing some act prescribed by law, to be performed by him, looking to the submission of such measures to the people. Our real concern here is not with the constitutionality or validity of the joint reso lution of our legislature here in question. The real reason why the secretary of state should not be compelled to perform the acts demanded of him by the relator is, that the question of the ratification of a proposed federal constitutional amendment is not one to be finally decided by direct vote of the people of the several states, but by the vote of the states and the people thereof, expressed through their representative law-making bodies or representative conventions held in the several states for that purpose. No decision of any court has come to our notice holding that an officer whose duty it is to perform acts looking to the submission to the people of initiative and referendum measures can be compelled by mandamus to perform any act looking to the submission of a question to the people which under no circumstances is referable to a direct vote

of the people for final decision as an initiative or referendum measure. The demand here made by the relator upon the secretary of state is, in its last analysis, a demand that he perform an act which I think he is not legally required to perform. Our decisions in *State, ex rel. Case v. Howell, Secretary of State*, 85 Wash. 281, and *State ex rel. Case v. Howell*, 85 Wash. 294, are in harmony with this view of the law, though this exact question was not there presented to the court.

I am of the opinion that the writ should be denied.

II.

OPINION OF THE SUPREME COURT OF OHIO.

IN RE HAWKE V. SMITH, SECRETARY OF STATE, No. 16349.

Nichols, C. J., Justices Jones, Matthias, Johnson, Donahue and Wanamaker concurring; Justice Robinson dissenting:

In what sense did the makers of the Constitution of the United States use the words "ratification" and "legislatures" in Article 5, which provides for the ratification of proposed amendments to the Constitution by the legislatures of three-fourths of the several states? In the use of the term "ratification" was a legislative act contemplated?

In *State ex rel. Davis v. Hildebrant, Secy. of State, et al.*, 94 Ohio St. 154, 114 N. E. 55, the meaning of the term "legislature," as used in Section 4, Article 1, of the United States Constitution, was involved. That section reads:

> The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

Here was a plain grant of power by the Federal Constitution to each of the states to pass laws on the subject referred to, subject to the reservation stated.

In the Hildebrant case we held that, in the exercise of this explicit power given by the Federal Constitution to each state to make the law referred to, the term "legislature" in Section 4, Article 1, of the United States Constitution "comprehends the entire legislative power of the state, and, as so used, includes not only the two branches of the General Assembly, but the popular will as expressed in the referendum provided for in Sections 1 and 1c of Article 2, of the Ohio Constitution."

We held further, in paragraph 3 of the syllabus:

> Under the latter clause of Section 4, Article I, of the United States Constitution, complete and plenary power over state legislation enacted thereunder rests in the federal Congress, and its laws supersede all state regulations upon the same subject. Under its grant of power to "make or alter such regulations," Congress did, by its apportionment act of August 8, 1911, legislate upon the subject, by recognizing as lawful such congressional districts as may be created in the manner provided by the laws of those states employing the constitutional referendum.

The case of *State ex rel. Davis v. Hildebrant, supra,* was affirmed by the Supreme Court of the United States, 241 U. S. 565, 36 Sup. Ct. 708, 60 L. Ed. 1172. It will be

observed that in that case, the state, in passing the redistricting law, which applied to and governed the people of the state, was engaged in the performance of a state function. The state was given the power by Section 4, Article 1, of the Constitution of the United States, to legislate on the subject, and in the performance of that state function of legislation it was proper to invoke every part of the machinery which the state had provided for the making of its laws, and the Hildebrant case conclusively determines that the referendum, is an essential part of that machinery.

Now, in this case, a different article of the federal Constitution is involved. It does not involve the making of a state law to govern merely the people of a state, but it provides for the participation by the state in the making of an amendment to the national Constitution, a change in the federal law to govern all of the states. The method prescribed by Article 5 of the Federal Constitution by which the state participates in the making of an amendment to the federal fundamental law is by ratification by the "legislatures of three-fourths of the several states," etc.

In the Hildebrant case the amendment to the state Constitution, adopted in 1912, which provided for the referendum generally on legislation by the General Assembly, was involved. But in November, 1918, the people adopted an amendment to the state Constitution for the express purpose of providing for a referendum on amendments to the Federal Constitution proposed by Congress under Article 5. The pertinent part of that amendment (Sections 1 and 1a of Article 2) is as follows:

> The people also reserve to themselves the legislative power of the referendum on the

> action of the General Assembly ratifying any proposed amendment to the Constitution of the United States.

It will be observed that this was adopted for the express purpose of allowing the people of the state to participate in the legislative acts of ratification of proposed amendments to the Federal Constitution. By this action the people provided for the inclusion of the popular will in the legislative power of ratifying any proposed amendment to the Constitution of the United States.

The functions conferred in different parts of the federal Constitution upon the legislatures of the states are manifestly dual in their nature. For example, in the election of United States Senators by the legislatures of the several states, as provided by the federal Constitution, until the recent amendment, the legislature acted as an electing power. It was not understood to be legislative, and in states in which the Governor had the veto power over legislation that power did not apply in the matter of electing senators. The legislature represented the state in a manner similar to that in which the electoral college represents it in the choice of President. On the other hand, the power conferred upon the legislatures in Section 4, Article 1, of the Constitution of the United States, which confers power on the legislature of each state to prescribe the "times, places and manner of holding elections for Senators and Representatives," is purely legislative; and, as already pointed out, in the exercise of that power all the legislative machinery of the state was called into action in the performance of that state legislative duty. It is true, as argued by counsel for plaintiff in error, that under Article 5 the state participates in an act which amends the federal Constitution, and in that

sense performs a federal function. But it does not follow that by the word "legislature" in that section a *corpus designatum* is meant. It participates in the making of a fundamental law, and its act is legislative in character. The making of the Constitution is the highest function of legislation. That being so, it follows that in the exercise of this legislative function of ratification the makers of the federal Constitution contemplated that all of the agencies provided by the state for legislation should be empowered to act in accordance with the provisions made by the state at the time the action on the ratification should be taken, and that the word "legislature" in Article 5 is used in that sense.

Judgment affirmed.

CONCURRING OPINION.

Wanamaker, J.:

The question in this case is not, should our state or nation be "wet" or "dry"? The question is not, Are you for or against the referendum in the making of state and national constitutions? The question is not, Are you for or against any particular amendment to the national Constitution, proposed or prospective? The question is, Can the referendum be used by the people of Ohio on any proposed amendment to the national Constitution when proposed by Congress and submitted to the states for ratification by "the legislatures" thereof? Is such a use of the Ohio referendum permitted, not by the Constitution of Ohio merely, for this is conceded, but by the Constitution of the nation, particularly Article 5?

A judge who would permit his personal preference on

the merits of any particular amendment to influence his judgment in deliberation upon and decision of such question, by so much as a pennyweight, not only disqualifies himself as a judge, but brings dishonor upon the judiciary.

I am for this judgment because the primary and paramount principle involved in it was unanimously approved by this court in 1916 by the judgment in the case of *State ex rel. Davis v. Hildebrant, Secy. of State, et al.*, 94 Ohio St. 154, 114 N. E. 55. This case was reviewed and unanimously approved by the United States Supreme Court within 60 days from the date of the judgment herein, as appears in 241 U. S. 565, 36 Sup. Ct. 708, 60 L. Ed. 1172. Now, what was the question in that case, and what was decided on that question?

The first paragraph of the syllabus of the Hildebrant case reads:

> The term "legislature," in Section 4, Article I, of the United States Constitution, comprehends the entire legislative power of the state; and, as so used includes not only the two branches of the general assembly, but the popular will as expressed in the referendum provided for in Sections 1 and 1c of Article II, of the Ohio Constitution.

The Supreme Court of the United States, in its syllabus upon the same case, uses this language:

> Under the referendum amendment of 1912 to the Constitution of Ohio, the people of that state having disapproved of the state redistricting law passed after Congress had enacted the apportionment act of 1911, and the state court having held that under the referendum amendment the legislative power was reserved in the people to be expressed by referendum, held that:
>
> The decision of the highest court of the

> state that under such amendment the legislative power of the state is now vested not only in the general assembly, but also in the people by referendum, and that a law disapproved by the referendum was no law, is conclusive here.

It was admitted in open court by counsel upon both sides of the case at bar that, unless it was substantially distinguishable, essentially different in principle, from the Hildebrant case, the right of referendum would likewise apply to the proposed amendment to the national Constitution.

It is already apparent from the syllabi quoted that the language to be construed in the Hildebrant case was the words "the legislature thereof," as used in Section 4, Article 1, of the Constitution of the United States, which section, so far as pertinent here, reads:

> The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof.

It is conceded that this section under consideration in the Hildebrant case is not the section involved in this case, and that what is involved here is Article 5, of the national Constitution, which so far as pertienent reads:

> The Congress * * * shall propose amendments to this Constitution * * * which * * * shall be valid * * * as part of this Constitution, when ratified by the legislatures of three-fourths of the several states.

Now, boiled down, the single question is: Did the Constitution makers intend to use the words "the legislature" differently in Article 1, paragraph 4, than they did in Article 5?

Those against the referendum claim an essential dif-

ference in the meaning of the words "the legislature" in Article 1 and Article 5. Those for the referendum insist that they are used essentially the same. Let us examine the articles respectively, with a view of determining what, if any, attributes or characteristics they have in common:

(1) Each article is a delegation of certain national power to "states," Article 1 for redistricting purposes, and Article 5 for ratification purposes.

(2) Each article before it may become effective requires proposals, or previous action, by the national law-making body, Congress.

(3) Each article, whether applied to redistricting or ratifying, affects national policies, the former oftimes swinging the balance of party power from one party to the other in the national Congress, thereby for a time at least changing the nation's policies, and the latter more permanently and potentially affecting policies.

(4) Each article recognizes the power involved as a law-making power having its origin in the national law-making body, and its consummation in the state law-making body.

Surely it will not be contended that the people of Ohio have failed to so declare and define their legislature in its powers touching the subject of lawmaking, either statutory or constitutional, as to be comprehensive enough to include a referendum on any proposed constitutional amendment.

The significant resemblances pointed out in the four foregoing items clearly and convincingly demonstrate that the national Constitution contemplated the words "the legislature" as meaning the same thing in Article 5 as in Article 1. The only difference mantainable touching the meaning of the words "the legislature" resides in the fact

that they appear in different articles. In all substantial and essential respects, the purpose, the power, the agency, and the achievement are the same. Too many legal distinctions, so called, exist in a persistent purpose to bring about a much desired decision rather than in any inherent differences of fundamental fact or primary principle.

It is urged that this construction of the words "the legislature" in reference to the states, destroys or devitalizes uniformity in ratification. But uniformity as to method of state government was neither designed nor desirable in the opinion of the fathers, but, upon the contrary, each state was presumed to deal with its own domestic affairs—that is, state affairs—in the manner best calculated to promote the safety and happiness of the people of that state, according to the judgment of the people of that state. In short, diversity of machinery for state government was then, as now, the prevailing rule, and the only uniformity contemplated by these amendments was that the lawmaking power, by whatever name known in the state, by whatever agency exercised in the state, should be the ratifying power in this case, as it was the redistricting power in the Hildebrant case.

It was further contended that a judgment in favor of the referendum in this case would elevate the state above the nation.

It must be remembered that we had state Constitutions before we had a national constitution, and that only by acting as states, through representatives and delegates, was the national Constitution adopted, first by the convention, and second by the states, and then it would not have been adopted by the states but for the overwhelming assurance that as soon as Congress would meet there

should be proposed and adopted, at the earliest practicable moment, a Bill of Rights safeguarding the rights of the states and the people. In this behalf it is significant to note Articles 9 and 10:

> Article 9:
>
> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
>
> Article 10:
>
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

It must be remembered that in the early history of the nation, especially at the time of the making of the national Constitution, the doctrine of state's rights was in the ascendancy—that is, the states were exceedingly jealous of their rights and powers as states and were loath to surrender them—and therefore the imperative demand for the reservation of all powers not delegated by the Constitution. Surely one of the most important and significant of all those powers reserved was the right of each state to determine for itself its own political machinery and its own domestic policies, and it can scarcely be claimed that it is within the power of any court to nullify or in any wise alter the political machinery of a state, especially that which the state has designed and designated as its lawmaking machinery.

It is also contended that at the time the national Constitution was made the referendum could not possibly have been contemplated, for it was then as unknown as the automobile and the airplane.

Undoubtedly this contention is true, but what of it? It was sufficient for the national Constitution to designate

that the states must ratify and that they must ratify by legislatures or conventions, in this case by legislatures; and that each state has the sole and paramount right to determine what its legislature shall be cannot now be disputed.

It is a matter of common knowledge that there is too much petty continuous disturbance of state laws by the various general assemblies of the several states. Too many laws are enacted, amended, and repealed without rhyme or reason, and the people of the state in large numbers regret whenever they have a legislature upon their hands. Suppose some one were to propose and the people were to pass an amendment to the state Constitution providing for the abolition of the general assembly for a period of ten years, during which time all laws should be proposed and enacted by the people of the state through the initiative and referendum. If the contentions of those who are against the referendum were to prevail, during such period, the state would be powerless to either favor or reject a proposed amendment to the national Constitution, because it had no general assembly. Such an absurd situation disqualifying a state from passing upon proposed amendments to the national Constitution surely was never contemplated.

When the national Constitution was adopted, at least three of the several states had what was known as an "executive council." Though this was rather an administrative or an executive name, in function the body was legislative; that is, it was the law-making power of the state. The Constitution of Ohio nowhere uses the word "legislature," and if the strict letter of the law be applied, Ohio has no legislature in the strict and technical sense. Its legislature is a "general assembly" plus the referendum

in the hands of the people. The constitutional fathers were wise in delegating this power to the states and designating the legislatures of those states as the ratifying power. They could have as readily designated the Governors, or the highest court in the state. But there was fitness in recognizing the governmental function exercised as a lawmaking function, and that therefore the most appropriate body to make the laws for the nation, by way of constitutional amendment, was the same body that made the laws of the state. This they said, and this they meant.

There is but one way, in my judgment, in view of Articles 1 and 5 of the national Constitution, in view of the decision in the Hildebrant case, *supra*, to sustain a judgment against the referendum in the case at bar, and that is by reversing the Hildebrant case and holding that the constitutional amendment of Ohio of 1912, on the referendum in lawmaking generally, and the amendment of 1918, on the ratification of amendments to the national Constitution, are both in clear conflict with Article 5 of the national Constitution.

The United States Supreme Court has repeatedly held that before a state or national law may be held unconstitutional the conflict must be clear to a degree known as beyond a reasonable doubt; and, if any doubt exists, that doubt must be resolved in favor of the state.

The Ohio Constitution, as amended in 1912 and 1918, is reasonably reconcilable with Article 5, as it is with Article 1.

The judgment is supported by both reason and authority.

Dissenting Opinion.

Robinson, J.:

I dissent from the judgment in this case for the reason that the judgment is, and must be, based upon an amendment to a state Constitution and a new and strained definition of the word "legislature" expounded by a state court.

At the time of the adoption of the federal Constitution the term "legislature" had a certain, definite meaning as the representative body delegated by the electors to make laws, and was so understood and intended as used in Article 5 thereof. Obviously the fundamental law does not change automatically with public sentiment and public policy, but changes only when public sentiment and public policy force an amendment thereto. No amendment has been made to Article 5, and I am not ready to participate in a misapplication of its plain and expressed meaning, nor to consent to an amendment to the federal Constitution by any other process than the process therein provided.

In my opinion the judgment here elevates state above nation, devitalizes the federal Constitution, makes it subject to as many interpretations as there are states, and destroys its uniform operation throughout the nation.

III.

OPINION OF THE SUPREME COURT OF OREGON.

IN RE KARL HERBRING, PETITIONER, v. GEORGE M. BROWN, AS ATTORNEY GENERAL OF THE STATE OF OREGON.

McBride, C. J., all concurring:

This is a proceeding in mandamus arising from the following facts: During the 30th Legislative Assembly of the state of Oregon, which adjourned February 27, 1919, there was enacted House Joint Resolution No. 1, which is a ratification of a proposed amendment of the Constitution of the United States, popularly known as the "National Prohibition Amendment."

On March 18, 1919, petitioner filed with the Secretary of State of Oregon a proposed form of petition demanding a referendum of said Resolution, which petition is in form and substance as required by law.

On March 19, 1919, the Secretary of State sent to the Attorney General two copies of said petition and requested him to provide a ballot title therefor.

On March 25, 1919, after considering the matter in the meantime, the Attorney General refused to provide a ballot title on the ground that in his opinion the measure was one which could not be referred to the people for two reasons: First, that a reference thereof to the people would violate Article V of the federal Constitution, wherein that article provides that the subject matter thereof should be passed on by the "legislature," which, as there used, is synonymous with "legislative assembly," and excludes the referendum. Second, that such refer-

ence to the people would violate Section 1 of Article IV, of the Oregon Constitution, wherein it is provided that the people of Oregon "also reserve power at their own option to approve or reject at the polls any act of the legislative assembly," because, it is claimed, the resolution sought to be referred is not an act within the meaning of the above quoted phrase.

Much of the argument here is devoted to a discussion of the constitutionality of the proposed reference.

We do not believe this resolution, ratifying the proposed constitutional amendment or any other resolution of our legislature, was made the subject of referendum by Sections 1 and 1a of Article IV, of our amended Constitution, which are as follows:

> Section 1. The legislative authority of the state shall be vested in a Legislative Assembly, consisting of a Senate and a House of Representatives, but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also to reserve power of their own option to approve, or reject, at the polls, any act of the legislative Assembly. The first power reserved by the people is the initiative, and not more than eight per cent. of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or

safety) either by the petition signed by five per cent. of the legal voters, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the Legislative Assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the state shall be had at the biennial regular general elections, except when the Legislative Assembly shall order a special election. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon and not otherwise. The style of all bills shall be: "Be it enacted by the people of the State of Oregon." This section shall not be construed to deprive any member of the Legislative Assembly of the right to introduce any measure. The whole number of votes cast for Justice of the Supreme Court at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided for.

Section 1a. The referendum may be demanded by the people against one or more items, sections, or parts of any act of the legislative assembly in the same manner in which such power may be exercised against

> a complete act. The filing of a referendum petition against one or more items, sections, or parts of an act shall not delay the remainder of an act from becoming operative. the initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent. of the legal voters may be required to order the referendum nor more than fifteen per cent. to propose any measure, by the initiative, in any city or town.

It seems clear to us that these sections apply only to proposed laws, and not to legislative resolutions, memorials and the like. In the initiative clause, it is said:

> The people reserve to themselves power to propose laws and amendments to the Constitution, and to enact or reject the same at the polls.

The reservation clause reads:

> And also reserve power at their own option to approve or reject at the polls any act of the legislative assembly.

In the provision for referendum we find a direction that,

> Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the ses-

> sion of the legislative assembly which passed the bill on which the referendum was demanded.

In Section 1a we find the provision, that

> The referendum may be demanded by the people against one or more items, sections, or parts of any act of the legislative assembly, in the same manner in which such power may be exercised against a complete act.

To ascertain what is meant by the term "Bill" and "Act," as used in the amendments quoted above, we must refer to the sense in which they were used in the Constitution before the initiative and referendum amendments were passed. The word "Bill" occurs in Section 2 of Article IV of the original Constitution where it is said, "The style of every bill shall be 'Be it enacted by the legislative assembly of the State of Oregon,' and no law shall be enacted except by Bill," thus indicating that a bill is a proposed law; a document in the form of a law presented to the legislature for enactment.

The same word is used in Sections 18 and 19 of Article IV, and Section 15 of Article V, and in the same sense as above indicated.

We come now to the term "act" as used in the Constitution. In Section 20 of Article IV, we find the following:

> Every act shall contain but one subject and matters properly connected therewith, which subject shall be embraced in the title. But if any subject shall be embraced in an act which shall not be embraced in the title, such act shall be void, only as to so much thereof as shall not be expressed in the title.

In Section 21, Article IV, the following occurs:

> Every act and joint resolution shall be plainly worded, etc.

In Section 22 of the same Article, it is ordained:

> No act shall ever be revised or amended by mere reference to its title, etc.

And in Section 28, it is prescribed:

> No act shall take effect until ninety days from the end of the session, etc.

No one can read these excerpts without at once arriving at the conclusion that, as referred to in the Constitution, the term "Bill" imports a document in the form of a law, presented to the legislature for enactment, and that the term "Act" as there used means a bill which has been enacted by the legislature into a law. That the framers of the Constitution intended to preserve the well known distinction between "Acts" and "Joint Resolutions," as indicated in Section 21, *supra*, wherein it is required that acts and joint resolutions shall be plainly worded.

The initiative and referendum amendments were passed and should be construed in the light of the construction put into the terms "Bill" and "Act," by the instrument they proposed to amend, and taking this view it must be held that as a joint resolution is neither a bill nor an act, it is not subject to the referendum.

Counsel for petitioner suggest that the term "Measures" used in the amendment enlarges the scope of the powers reserved beyond the express reservation, but this is evidently not the purpose with which that term is employed. As before observed, there are two powers reserved: (1) the power to propose laws and amendments to the Constitution, and to enact or reject them at the polls, and

(2) the power to enact or reject at the polls any act of the legislative assembly. The subject matter upon which these powers may be exercised, namely: initiative laws, constitutional amendments, and acts of the legislature referred to the people, are thereafter referred to collectively as "measures" merely as a matter of convenience and to avoid frequent enumeration of the powers reserved, and not with the intent to include other and different powers within the scope of the amendment. Had it been the intent of the framers of the referendum amendment to go beyond these express reservations, it would have been easy and natural for them to have said so.

To give the amendment the effect contended for by petitioners, we would have to read into the reservation the words "and resolutions," making it read, "The people reserve to themselves power * * * to approve or reject at the polls any act (or joint resolution) of the legislative assembly," and where the amendment requires that the referendum petition shall be filed within 90 days, "after the final adjournment of the legislature which passed the bill," we would be required to judicially amend the section so as to make it read, "within ninety days after the final adjournment of the legislature which passed the bill (or joint resolution)."

We are not prepared to go into the business of amending the Constitution to meet supposed hardships, and must hold that the referendum cannot be invoked in the present instance.

Under an amendment to the Constitution of California, in some particulars copied from that here discussed, and in all necessary particulars the same in substance, the Supreme Court of that state has held that the referendum can only be invoked against statutes and not against joint

resolutions. *Hopping v. Council of City of Richmond*, 170 Cal. 605, 150 Pac. 977.

It is further urged that, even conceding that the resolution is not one which our amended constitution permits to be placed upon the ballot, the attorney general is not the person or the official who is entitled to raise the question; that his duties being purely ministerial, he is required to place a ballot title upon any petition filed with the Secretary of State and transmitted to him, as required by Section 3475, L. O. L., as amended by Chap. 176, laws 1917.

It may well be contended that if a matter proposed for reference to the electorate is within the class of subjects upon which the constitution permits a referendum, to-wit: acts passed by the legislature, the Attorney General has no authority to pass upon the constitutionality of the procedure. This would certainly be a plausible contention in the case of petitions under the initiative provisions of the section now being considered. He probably could not be heard to say: "The law you propose to initiate would be unconstitutional if passed, therefore I will not give you a ballot title," but such a case is not before us. We have here presented a case where it is proposed to put upon the ballot for reference a proceeding by the legislature for which the constitution has made no provision, and which does not belong to a class of subjects that can be referred under any circumstances. To hold that the Attorney General must prepare a ballot title under such circumstances, would place him at the beck and call of any restless person who might desire to refer any subject for the purpose of obtaining a straw vote upon it, from a joint memorial petitioning Congress to improve a

harbor up to the action of the Peace Conference upon the covenant of the League of Nations.

The act, of which the section referred to is a part, does not contemplate any such contingency, and the opening paragraph of the first section is itself a legislative interpretation of the scope of the constitutional amendment, and reads as follows:

> The following shall be substantially the form of petition for the referendum to the people, on any act passed by the Legislative Assembly of the State of Oregon, or by a City Council. Section 3470, L. O. L.

It is a petition to refer an act that must be filed with the Secretary of State, and it is to a petition for an act that the Attorney General is required to affix a ballot title.

The form of petition given in the section last referred to, is even more explicit. The descriptive portion of the form prescribed for a petition to refer, is as follows:

> We, the undersigned citizens and legal voters of the State of Oregon, (and the district of ....., County of ..... or city of ....., as the case may be) respectfully order that the senate (or house) bill No. ....., entitled (title of act, and if the petition is against less than the whole act, then set forth here the part or parts on which the referendum is sought) passed by the Legislative Assembly of the State of Oregon at the regular (special) session of the Legislative Assembly, shall be referred to the people of the state, etc.

The section of the statute requiring the Attorney General to fix a ballot title to petitions for a referendum, has reference to petitions regarding acts, that is, laws passed by the legislature; as to these he is compelled to

prepare ballots, but there is no statute requiring him to prepare such titles for any other.

This view renders it unnecessary to consider the other questions raised in the argument.

The demurrer will be sustained and the writ dismissed.

IV.

OPINION OF THE SUPREME COURT OF MAINE.

In re Opinion of the Justices.

Answers to questions propounded by the Governor to the Justice of the Supreme Judicial Court. Opinion by entire Court, all Justices concurring:

To the Honorable Carl E. Milliken, Governor of Maine:

The undersigned, Justices of the Supreme Judicial Court having considered the questions propounded by you under date of July 9, 1919, relating to the ratification of the Eighteenth Amendment to the Constitution of the United States and the necessity of submitting by referendum the ratifying resolve of the Legislature to the qualified voters of the state, respectfully submit the following answer:

The request for our opinion is accompanied by a statement of facts, from which it appears that the Sixty-Fifth Congress of the United States on December 3, 1917, adopted a joint resolution proposing an amendment to the Constitution of the United States, which amendment provides that after one year from ratification thereof the manufacture, sale, or transportation of intoxcating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is thereby prohibited.

This amendment, thus adopted by joint resolution of Congress, was proposed to the Legislature of Maine of 1919 for ratification, and was ratified by a joint resolve of the Senate and House of Representatives; the concluding paragraph, after reciting all the preliminary steps, being of the following tenor:

> Therefore resolved that the Legislature of the state of Maine hereby ratifies and adopts this proposed amendment to the Constitution of the United States. And that the secretary of state of the state of Maine notify the Secretary of State of the United States of this action of the Legislature by forwarding to him an authenticated copy of this resolve.

Petitions apparently bearing the requisite number of signatures having been seasonably filed with the secretary of state, requesting that this resolve be referred to the people under Amendment 31 of Article 4 of the Constitution of Maine, known as the initiative and referendum amendment, the question is now asked of the Justices whether this joint reserve of the Legislature of Maine, ratifying an amendment to the federal Constitution, proposed by and duly submitted for ratification by the Congress of the United States, is subject to the provisions of Amendment 31, and therefore must be referred to the people under the facts existing in this case.

ANSWER.

This question we answer in the negative. In our opinion this resolve does not come within the provisions of the initiative and referendum amendment, and cannot be referred to the people for adoption or rejection by them. The ratification of the proposed amendment to the Consti-

tution of the United States was complete, final and conclusive, so far as the state of Maine was concerned, when the Legislature passed this resolve.

(1) Our reasons are as follows: The subject-matter of the action of the Legislature under consideration is a proposed amendment to the Constitution of the United States, the proposal and ratification of which are wholly governed by the provisions of that Constitution. Those provisions are clear and explicit. They are as follows:

> Article 5. The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Consttution, or, on the application of the Legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several states, or by convention in three-fourths thereof, as the one or the other mode may be proposed by the Congress.

This article was a part of the original Constitution of 1789, and has remained unchanged to the present day.

It will be observed that there are two distinct stages in the process, the proposal and the ratification. The proposal may originate in either of two ways:

First, from Congress, by joint resolution, whenever two-thirds of both Houses deem it necessary.

Second, from the states, whenever two-thirds of the Legislatures of the several states may request that a national constitutional convention be called for that purpose, in which case Congress must call such a convention.

(2, 3) All the federal amendments which have thus far been adopted have been proposed in compliance with the

first method; that is, by a joint resolution of the two Houses of Congress. No national constitutional convention has ever been called or held. Such proposed amendment is a matter within the sole control of the two houses, and is independent of all executive action. The signature of the President is not necessary, and it need not be presented to him for approval or veto. *Hollingsworth v. Virginia*, 3 Dall. 378, 1 L. Ed. 644; *State v. Dahl*, 6 N. D. 81, 68 N.W. 418, 34 L. R. A. 97. Nor is Congress, in proposing constitutional amendments, strictly speaking, acting in the exercise of ordinary legislative power. It is acting in behalf of and as the representative of the people of the United States under power expressly conferred by Article 5, before quoted. The people, through their Constitution, might have designated some other body than the two houses or a national constitutional convention as the source of proposals. They might have given such power to the President, or to the Cabinet, or reserved it in themselves; but they expressly delegated it to Congress or to a constitutional convention.

As there are two methods of proposal, so there are two methods of ratification. Whether an amendment is proposed by joint resolution or by a national constitutional convention, it must be ratified in one of two ways:

First, by the Legislatures of three-fourths of the several states; or,

Second, by constitutional conventions held in three-fourths thereof, and Congress is given the power to prescribe which mode of ratification shall be followed.

Hitherto Congress has prescribed only the former method, and all amendments heretofore adopted have been ratified solely by the approving action of the Legislature

in three-fourths of the states. That is the mode of ratification prescribed by Congress in case of the amendment now under consideration, and it was in pursuance of that prescribed mode that this ratifying resolve was passed by the Legislature of Maine.

(4) Here, again, the state Legislature, in ratifying the amendment, as Congress in proposing it is not, strictly speaking, acting in the discharge of legislative duties and functions as a lawmaking body, but is acting in behalf of and as representative of the people as a ratifying body, under the power expressly conferred upon it by Article 5. The people, through their Constitution, might have clothed the Senate alone, or the House alone, or the Governor's Council, or the Governor, with the power of ratification, or might have reserved that power to themselves to be exercised by popular vote. But they did not. They retained no power of ratification in themselves, but conferred it completely upon the two houses of the Legislature; that is, the Legislative Assembly.

(5) It is a familiar, but none the less fundamental, principle of constitutional law that the Constitution of the United States is a compact made by the people of the United States to govern themselves as to general objects in a certain manner, and this organic law was ordained and established, not by the states in their sovereign capacity, but by the people of the United States. The preamble, "We, the people," so states, and such is the fact, *Chisholm v. Georgia*, 2 Dall. 419, 1 L. Ed. 440. It is equally well settled that it was competent for the people to invest the federal government, through the Constitution, with all the powers which they might deem necessary or proper, and to make those powers, so far as conferred,

supreme, to prohibit the states from exercising any powers incompatible with the objects of the general compact, and to reserve in themselves those sovereign authorities which they did not choose to delegate either to federal or state government. *Martin v. Hunter's Lessee,* 1 Wheat. 304, L. Ed. 97. Whether a certain power has been conferred either expressly or by reasonable implication upon the national government, or has been reserved to the states or to the people themselves, must depend upon the construction of the language of the Constitution governing that particular subject-matter.

(6) It admits of no doubt that in the matter of amendment which is governed by Article 5, the people divested themselves of all authority and conferred the power of proposal upon Congress or upon a national constitutional convention, and the power of ratification upon the state Legislatures or upon state constitutional conventions.

This view has the sanction, not only of reason, but of authority. Mr. Iredell, in the North Carolina convention which ratified the federal Constitution, in discussing this ratifying clause, said:

> By referring this business to the Legislatures, expense would be saved, and in general, it may be presumed, they would speak the general sense of the people. It may, however, on some occasions be better to consult an immediate delegation for that purpose. This is therefore left discretionary. 4 Elliott, Deb. 176, 177.

This discretion, under the terms of Article 5, is to be exercised by Congress.

In *Dodge v. Woolsey,* 18 How. 331, 348 (15 L. Ed. 401), the Supreme Court of the United States, in emphasizing the supremacy of the Constitution, said:

> It is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them, by the Congress of the United States, when two-thirds of both houses shall propose them, or when the Legislatures of two-thirds of the several states shall call a convention for proposing amendments, which, in either case, become valid, to all intents and purposes, as a part of the Constitution, when ratified by the Legislatures of three-fourths of the several states, or by convention in three-fourths of them, as one or the other mode of ratification may be proposed by Congress. * * * Now, whether such supremacy of the Constitution, with its limitations in the particular just mentioned, and with the further restriction laid by the people upon themselves, and for themselves, as to the modes of amendment, be right or wrong politically, no one can deny that the Constitution is supreme, as has been stated, and that the statement is in exact conformity with it.

A well-known writer on Constitutional Law, after tracing the history and the scope of Article 5, concludes as follows:

> Whether an amendment is proposed by Congress or by a convention, it is ratified or rejected by the representatives of the people either in legislature or in convention, and not by the people voting on it directly. The people have no direct power either to propose an amendment or to ratify it after it is proposed and submitted. Watson, Const. vol. 2, p. 1310.

It is interesting to note in this connection, as an historical fact demonstrating the attitude of the federal government, that according to their admitted and accepted practice if a state legislature has once ratified a federal amendment a subsequent Legislature has no power to rescind such ratification. Such rescission was attempted by Ohio and New Jersey with reference to the Fourteenth Amendment, and by New York with reference to the Fifteenth; but the proclamation of the Secretary of State for the United States was issued, announcing the final adoption of the amendments as a part of the federal Constitution, notwithstanding the attempted rescission by subsequent Legislatures. The attempted rescission was ignored. Watson, Const. vol. 2, p. 1315.

If a subsequent legislature cannot rescind the ratification by a former legislature, it would seem that much less could such ratification be rescinded by the subsequent vote of the people, especially in view of the fact that the people have unreservedly surrendered all authority over that subject-matter.

It follows, from what has been said, that even if the people of Maine, by adopting in 1908 the initiative and referendum amendment of our state Constitution, had attempted to assume or regain the power of ratification of proposed amendments to the federal Constitution, by exercising a supervisory authority over the state legislature in that respect, such attempt would have been futile. Their power over amendments had been completely and unreservedly lodged with the bodies designated by Article 5, and so long as that article remains unmodified they have no power left in themselves either to propose or to ratify federal amendments. The authority is elsewhere.

(7) But the people, by the adoption of the initiative and referendum amendment, did not intend to assume or regain such power.

The purpose and scope of that amendment were fully considered and discussed in the case of *Moulton v. Scully*, 111 Me. 428, 446, 89 Atl. 944, and it was there held that the design of the initiative and referendum was to make the law-making power of the Legislature, not final, but subject to the will of the people, and to confer that power in the last analysis upon the people themselves. And the court adds:

> This, too, marks the limitation of the amendment. It applies only to legislation, to the making of law, whether it be a public act, a private act, or a resolve having the force of law. This is shown clearly and conclusively by the language of section 2 of part third of Article IV, under the general head of Legislative Power. "Every bill or resolution having the force of law to which the concurrence of both houses may be necessary, * * * which shall have passed both houses, shall be presented to the Governor, and if he approve, he shall sign it," etc. The referendum applies and was intended to apply, only to acts or resolves of this class, to "every bill or resolution having the force of law," that is, to what are commonly know as legislative acts and resolves, which are passed by both branches, are usually signed by the Governor, and are embodied in the Legislative Acts and Resolves, as printed and published. And the words "No act or joint resolution of the Legislature," etc., before quoted, in the referendum amendment must be construed in the light of the context, considering all the sections and parts and articles together, as mean-

> ing "no act or joint resolution of the Legislature having the force of law." This is the simple and plain interpretation of simple and plain language.

In the application of that rule of construction this court held in that case that a joint address to the Governor on the part of both branches of the Legislature calling for removal of a public officer was beyond the scope of and unaffected by the referendum. The same rule applies here with equal force. This resolution ratifying the proposed constitutional amendment, was neither a public act, a private act, nor a resolve having the force of law. It was in no sense legislation. It was not signed by the Governor, nor could it have been vetoed by him. It was simply the ratifying act of the particular body designated by Article 5 of the Federal Constitution to perform that particular act. The principles laid down in *Moulton v. Scully* are decisive of this point.

The Supreme Court of Oregon, in a case decided on April 29, 1919, passed upon this branch of the question, where this same federal amendment was involved, and held that the term "any act of the legislative assembly," made the subject of referendum by the amended Constitution of Oregon, did not include a joint resolution, but only proposed laws, *Herbring v. Brown*, 180 Pac. 328.

In conclusion, it may be said that not only have all previous amendments to the federal Constitution been ratified by two-thirds of the legislatures of the several states, but this particular Eighteenth Amendment, commonly spoken of as the prohibitory amendment, has already been promulgated by federal authorities as having become a part of the Constitution through this same avenue.

The State Department of the United States, under date of January 29, 1919, issued its proclamation announcing that this Eighteenth Amendment had been duly ratified by the Legislatures of three-fourths of the states, including by name the state of Maine, and therefore certifying, in pursuance of Rev. St. U. S. 205 (U. S. Comp. St. 303.), that the amendment aforesaid has became valid to all intents and purposes as a part of the Constitution of the United States. See appendix to part 2 of U. S. Stat. 3d Session, Sixty-fifth Congress, 1918-1919.

The construction which we adopted is evidently the same which the federal authorities have placed upon the federal Constitution. With them the chapter is regarded as closed.

For the reasons hereinbefore set forth we answer the propounded question in the negative.

V.

OPINION OF THE SUPREME COURT OF COLORADO.

IN RE CHARLES B. PRIOR, CLARENCE E. LEARY, WALTER M. APPEL, PLAINTIFFS IN ERROR, V. JAMES R. NOLAND, AS SECRETARY OF STATE OF THE STATE OF COLORADO, DEFENDANT IN ERROR. No. 9649.

Allen, J., Justices Burke nd Teller concurring; Justice Denison dissenting:

This is a suit in mandamus. The trial court sustained a demurrer to the petition, and a judgment of dismissal was entered. The petitioners bring the cause here for review, assigning as error the sustaining of the demurrer.

The petition for a writ of mandamus, with the exhibit attached thereto, discloses the following facts:

The 65th Congress of the United States, at is second session, in December, 1917, by a joint resolution duly adopted, proposed an amendment to the Constitution of the United States, popularly known as the "National Prohibition Amendment."

On January 15, 1919, the General Assembly of the State of Colorado ratified the proposed amendment by a concurrent resolution, which, after reciting the joint resolution of congress proposing the amendment, contains the following language:

> *Therefore, be it resolved* by the joint assembly of the State of Colorado, that the said proposed amendment to the Constitution of the United States of America be and the same is hereby ratified by the Joint Assembly of the State of Colorado.

Thereafter, and prior to June 10, 1919, referendum petitions were prepared and signed, and were tendered for filing to the secretary of state. In these petitions, the signers "order and demand" that the resolution of the Joint Assembly, ratifying the National Prohibition Amendment, shall be submitted to the legal voters for their adoption or rejection at the polls," etc. The persons designated to represent the signers of the referendum petition are the petitioners of this mandamus suit, the plaintiffs in error.

The secretary of the State of Colorado, who is the respondent in this case, the defendant in error, refused to file the petitions, or to so act in the premises, whereby the concurrent resolution in question would be submitted to the voters at the next general election for their adop-

tion or rejection. It is to compel him to thus act, and to file the petitions, that the writ is sought.

The demurrers, which was sustained, and the argument thereon, present two questions, namely:

1. Does Article V, of the federal Constitution, providing for ratification of proposed amendments "by the legislatures of three-fourths of the several states," forbid the exercise of the referendum upon a joint concurrent resolution of the Joint Assembly ratifying a proposed amendment to the Constitution of the United States?

2. Does Section 1 of Article V of the Constitution of the State of Colorado authorize and permit the exercise of the referendum upon such resolution?

Our discussion will be confined, chiefly, to the provisions of the state constitution relating to the referendum; in other words, to the second question above mentioned.

Section 1, of Article V, of the State Constitution, so far as the same is pertinent to this case, reads as follows (italics ours):

> Section 1. The legislative power of the state shall be vested in the Joint Assembly consisting of a senate, a house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose *laws* and amendments to the constitution and to enact or reject the same at the polls independent of the General Assembly, and also reserve power at their option to approve or reject any act, item, section or part of any *act* of the General Assembly.
>
> "The first power hereby reserved by the people is the initiative, and at least eight per cent. of the legal voters shall be required to propose any measure by petition, * * *
>
> The second power hereby reserved is the

> *referendum,* and it may be ordered * * * against any act, section or part of any *act* of the General Assembly, * * * referendum petitions shall be addressed to and filed with the Secretary of State not more than ninety days after the final adjournment of the session of the General Assembly, that passed the *bill* on which the referendum is demanded. The filing of a referendum petition against any item, section or part of act, prevents the same from becoming operative. The veto power of the Governors shall not extend to *measures* initiated by, or referred to, the people. All elections on *measures* referred to the people of the state shall be held at the biennial regular general election, and all such measures shall become the *law* or a part of the constitution, when approved by a majority of the votes cast thereon. * * * this section shall not be construed to deprive the general assembly of the right to enact any measure. * * *
>
> The Secretary of State shall submit all measures initiated by or referred to the people for adoption or rejection at the polls, in compliance herewith.

From the above quoted constitutional amendment, it is seen that the people, in granting legislative powers to the General Assembly, reserved to themselves "the power at their option to approve or reject any act * * * of the General Assembly."

The controversy in the instant case, upon the question now under consideration, centers about the word "act" in the clause last above quoted. It is the contention of the plaintiffs in error that the word is broad enough to comprehend not only a general statute, enacted by a bill, but also such concurrent resolution as the one involved in this case.

The presumption is in favor of the natural and popular meaning in which the words are usually understood by the people who have adopted them. 12 C. J. 705. In the popular sense, the term "act" refers to a general statute, or law, enacted by a bill. A resolution, concurrent or otherwise, is commonly referred to as a "resolution." The rule that the words and terms of a constitution are to be interpreted and understood in their most natural obvious meaning, also tends to exclude a resolution from the meaning of the term "act." An act is a law, and under our state constitution, "no law shall be passed except by bill." Section 17, Article V. It is only in the sense of a law, statute, that the term "act" is used in the initiative and referendum constitutional amendment. This conclusion is aided by the fact that the term in question is used in connection with the word "bill," where it is provided, that referendum petitions shall be filed, etc., after the adjournment of the General Assembly that "passed the bill on which the referendum is demanded." The concurrent resolution involved in the instant case was not passed by a bill; neither does it have the enacting clause required for "the laws of the state" by Section 18, Article V, of the state constitution. A resolution is not a bill. *May v. Rice*, 91 Ind. 551. The distinctions between a bill and resolution are well defined. *Henderson v. Lithographing Co.*, 2 Colo. App. 257. Under the circumstances, we may adopt the following language, contained in *Lithographing Co. v. Henderson*, 18 Colo. 262:

> The concurrent resolution adopted by the senate, * * * and by the house, * * * cannot be held to be a law of the state. The resolution was not passed by "bill" as provided by Sections 17 and 18, of the Constitution.

In *Herbring v. Brown*, 180 Pac. 328, the Supreme Court of Oregon, without a dissenting vote, held that the various sections of their initiative and referendum amendment "applied only to proposed laws, and not to legislative resolutions, memorials, and the like," and therefore, did not apply to the legislative resolution involved in that case, which was a joint resolution of their legislative assembly, ratifying the national prohibition amendment. The Oregon court in arriving at its conclusion, considered and adopted the sense in which the terms "bill" and "act" were used in the constitution before the initiative and referendum amendments were adopted. The same method may properly be employed in the instant case, with the same result, holding that the term "act" as used in various parts of the constitution, "means a bill which has been enacted by the legislature into a law," and further that:

> The initiative and referendum amendments were passed and should be construed in the light of the consideration put upon the terms 'bill' and 'act' by the instrument that it proposed to amend, and taking this view it must be held that, as a joint resolution is neither a bill nor an act, it is not subject to the referendum.

The decision of the Oregon court, holding that a legislative resolution ratifying an amendment to the federal constitution could not be referred to the people, was not based on any grounds coming beyond the provisions of the state constitution itself, or the matters hereinbefore discussed. What has already been said in this opinion is sufficient to dispose of this case, resulting in the determination that our state constitution does not authorize or

permit the exercise of the referendum on any concurrent resolution, or upon the one involved in the instant case.

There are other reasons why the resolutions involved in this case is not subject to the referendum. One of these is suggested by the argument of the plaintiffs in error, wherein they state that "it is not reasonable to believe" that the people intended, when adopting the initiative and referendum amendment, "to deny to themselves the right to adopt or reject a measure which, once adopted, can never be amended or repealed except by the concurrence of three-fourths of the states of the Union." In ordinary legislative matters, the general assembly, of course, derives its power from the people of the state, and the people may reserve to themselves any power they desire, but in the matter of the ratification of a proposed amendment to the federal Constitution, the general assembly does not act in pursuance or any power delegated or given to it by the state constitution, but exercises a power which it possesses by virtue of the fifth article of the Constitution of the United States. That article provides that proposed amendments "shall be valid, * * * as parts of the constitution, when ratified by the legislatures of three-fourths of the several states." A ratification by a general assembly, of a proposed amendment to the federal Constitution, is not, therefore, a law, making legislation for the state, subject to approval or rejection by the referendum. In this connection, we adopt the language of In re Opinion of Justice (Maine), 107 Atl. 673, 674, as follows:

> * * * the state legislature in ratifying the amendment, as Congress in proposing it, is not, strictly speaking, acting in the dis-

> charge of legislative duties and functions as a law-making body, but is acting in behalf of, and as representative of the people as a ratifying body, under the power expressly conferred upon it by Article 5. The people, from their Constitution, might have clothed the Senate alone, or the House alone, or the Governor's council, or the Governor, with the power to themselves to be exercised by popular vote. But they did not. They retained no power of ratification in themselves, but conferred it completely upon the two houses of the legislature; that is, the legislative assembly.

The conclusion just stated, as it is expressed in the paragraph above quoted, results from our opinion upon the question, raised by the demurrer, whether or not the federal constitution, in Article V thereof, permits a referendum and a resolution of a general assembly which ratifies a proposed amendment to the Constitution of the United States. Article V provides for a ratification of proposed amendments by the "legislatures." It is the contention of the plaintiffs in error that the word "legislatures" thus used, means "the whole legislative power of the state." This definition is intended to be made applicable in the instant case by including the legislative power of the people as given by the referendum. In our opinion, however, the term "legislature" as used in Article V, of the federal Constitution, means that body of persons composing the ordinary representative law-making body of the state. Under that definition it necessarily follows that the people have no power to ratify a proposed amendment to the federal Constitution, by a popular vote, and therefore can not exercise the referendum upon such a ratifying legislative resolution as is involved in the in-

stant case. The conclusion we reach in this matter, is the one adopted, and ably supported, in the opinion of the Justices of the Supreme Judicial Court of Maine, all justices concurring, reported in 107 Atl. 673. A discussion of this subject, which arrives at the same result, may be found in the dissenting opinion of Justice Parker in *State v. Howell*, (Wash.), 181 Pac. 928.

The judgment is affirmed.

VI.

OPINION OF THE SUPREME COURT OF ARKANSAS.

IN RE WHITTEMORE V. TERRAL, SECRETARY OF STATE.
No. 5845.

McCulloch, C. J.:

The General Assembly of this State, during the last session thereof, adopted a joint resolution ratifying the proposed amendment to the Constitution of the United States prohibiting "the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof, for beverage purposes," and appellants and other legal voters, constituting more than five per centum of the voters of the states, filed their petition with the Secretary of State in apt time asking for a referendum to the people of said resolution in accordance with the provisions of Amendment No. 10 to the Constitution. The Secretary of State refused to certify the referendum, and this action was instituted by appellants in the Circuit Court of Pulaski County to compel him to do so.

The contention of appellants is (1) That the federal Constitution, in providing for the ratification of amendments by the legislatures of three-fourths of the several states, does not restrict the powers of the states so as to prohibit them from controlling the action of their representative legislative assemblies by referendum to the people or otherwise, but that it relates to the ultimate legislative authority of the states in whatever form expressed; and (2) That the action of the General Assembly of this State ratifying the amendment falls within the terms of Amendment No. 10, providing for the referendum.

On the other hand, it is contended by the Attorney General who appears on behalf of the Secretary of State, that the power of ratification conferred by the federal Constitution relates solely to the legislative assemblies of the states, that it cannot be brought within the reserved legislative authority of the peopie themselves, and that the language of Amendment No. 10 does not apply the referendum to action of the General Assembly in ratifying an amendment to the federal Constitution. We proceed to a consideration of the last of the propositions stated, and since our conclusion on that is found to be decisive of this case, we need go no further.

Amendment No. 10 does not, in our opinion, provide for a referendum on the action of the General Assembly in ratifying an amendment to the federal Constitution. That portion of our Constitution reads as follows: "The legislative powers of this state shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, but the people of each municipality, each county and of the state, reserve to themselves power to propose laws and amendments to the Constitutio nand to enact or reject the same at the polls as

independent of the Legislative Assembly, and also reserve power at their own option to approve or reject at the polls any act of the Legislative Assembly. The first power reserved by the people is the initiative, and not more than eight per cent. of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon.

"The second power is a referendum, and it may be ordered, (except as to laws necessary for the immediate preservation of the public peace, health or safety, either by the petition signed by five per cent. of the legal voters or by the Legislative Assembly as other appeals are enacted.) Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the Legislative Assembl ywhich passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the state shall be had at the biennial regular general elections, except when the Legislative Assembly shall order a special election. Any measure referred to the people shall take effect and become a la wwhen it is approved by a majority of the votes cast thereon and not otherwise. The style of all bills shall be, 'Be it Enacted by the People of the State of Arkansas.' This section shall not be construed to deprive any member of the Legislative Assembly of the right to introduce any measure. The whole number of votes cast for the office of Governor at the regular election last preceding the filing of any petition for the initiative, or

for the referendum, shall be the basis on which the number of legal votes necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State, and in submitting the same to the people, he and all other officers, shall be guided by the general laws and the acts submitting this amendment until legislation shall be specially provided therefor.

An analysis of this provision of our Constitution reveals the fact that the reserve referendum power of the people relates only to laws enacted by the General Assembly. The word "act," as there used, means an enacted law—a statute. This is clearly manifested by that part of the language used which provides that referendum petitions must be filed not more than ninety days after adjournment of the session "At which the bill on which the referendum is demanded," and that a "Measure referred to the people shall take effect and become a law when it is approved by a majority vote thereon." The words "act" and "measure" and "law" are used interchangeably, showing plainly that the power relates to the enactment of laws, and not to the exercise of other functions by the legislative body. The word "act" is not so frequently used in our Constitution as to give fixed definition to it, but in one instance, it is made use of in such a way as to clearly indicate the reference to a statute. Section 31, Article 5. But aside from any definition fixed in the Constitution, and aside from the technical definition given by lexicographers, we know that the term "Act of the legislature" not only has a fixed popular meaning, but that the unbroken custom in the enactment of laws is to make use of the term "act" in the caption or title to a statute. In turning through the printed satutes, we find,

without exception, that the form of caption used is "An Act to Provide" or "An Act to Amend," etc., showing the universal legislative practice to treat the set form as expressive of the meaning that an act of the legislature relates to a law and not to other proceedings of the legislature. Amendment No. 10 was adopted to change the Constitution only with respect to those things in conflict with the amendment (*Hodges v. Dawdy*, 104 Ark. 583) and the language of the amendment can be understood in the meaning in which it was used in the Constitution and in the legislative opinion.

Now the action of the legislature, pursuant to the power conferred by the federal Constitution, ratifying a proposed amendment to that Constitution is not the enactment of a law. It possesses none of those elements. Laws are enacted only when the legislative will is accomplished. They may be proposed by legislative bills or resolutions, according to constitutional provisions prescribing the method of exercise of the legslative functions, but they do not become laws until the enactment is consummated. The ratification by the legislature of an amendment to the federal Constitution is but a step in the enactment of a law, and that step does not amount to a law even though it results, with the joint action of other states, in the adoption of the proposed constitutional amendment.

The Attorney General, in his brief, very appropriately likens it to a roll call of the states upon the question of ratification, and he adds that the action of the legislature of a single state is of itself "no force as a law, makes no rule of conduct or government, and provides no penalty." This is correct. The action of the General Assembly in the ratification of an amendment to the federal

Constitution is not a law, and our conclusion is that such action does not fall within the provisions of Amendment No. 10.

It is interesting to know that the Supreme Court of Oregon reached the same conclusion in deciding this question under the referendum provision of the Constitution from which the precise language of Amendment No. 10 was borrowed. *Herbring v. Brown,* 180 Pac. 328. We approve the reason of the court given in that case for reaching the same conclusion which we now reach.

The Supreme Court of the State of Washington reached the opposite conclusion in the case of *Miller v. Howell,* 181 Pac., 920, in construing somewhat similar language in their constitutional provision concerning the reserved referendum power; but we do not agree with that court in its process of reasoning, nor in the result reached.

It follows that the Circuit Court was correct in its decision, and the judgment is affirmed.

VII.

OPINION OF THE SUPREME COURT OF CALIFORNIA.

IN RE J. A. BARLOTTI, PETITIONER, V. D. B. LYONS, AS REGISTRAR OF VOTERS OF VOTERS OF THE COUNTY OF LOS ANGELES. No. 6219.

Angellotti, C. J., Justices Shaw, Wilbur, Olney, Lennon, and Lawlor, concurring:

This is a proceeding in mandamus, the object being to procure a writ requiring respondent to file in his office for examination and transmission to the Secretary of State

a referendum petition for the submission to the electors of the state, for their approval or rejection, of the joint resolution of the senate and assembly ratifying for the State of California what is known as the eighteenth amendment to the Constitution of the United States, relating to intoxicating liquors. Two questions are presented; one being whether in view of the provisions of Article V of the Constitution of the United States, the question of the ratification of the proposed amendment by the state was not finally and conclusively determined by the adoption of the joint resolution of ratification by the legislature, utterly regardless of the construction to be given to the provisions of our own constitution, and the other being whether the referendum provisions of our state Constitution (Section 1, Article IV) may be construed as intended to be applicable in the case of a resolution of the character of the one here involved.

With reference to the former of these questions, it is conceded, as necessarily it must be conceded, that in so far as the Constitution of the United States speaks upon the matter of amendments thereto, it controls, and any provision of a state Constitution in conflict therewith must be held as naught. Article V, of that Constitution, relative to amendments, in so far as is material here, provides: "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to the Constitution, or on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid, to all intents and purposes, as part of this Constitution, *when ratified by the legislatures of three-fourths of the several states or by conventions in three-fourths thereof, as the one or the other mode of ratification may be pro-*

posed by the Congress, * * * " (The italicts are ours.) In the case at bar, the amendment was proposed by the Congress of the United States, and the joint resolution of proposal declared that the amendment would "become valid as a part of the Constitution when ratified by the legislatures of the several states as provided by the Constitution." The effective words of ratification of the joint resolution of our legislature were: "Resolved by the senate and the assembly of the legislature of the State of California, jointly, at its forty-third session * * * that the said proposed amendment be and the same is hereby ratified by the legislature of the State of California." The question we have in this connection is a very narrow one, being simply one as to the meaning of the word "legislatures" as used in the clause "when ratified by *the legislatures* of three-fourths of the several states" of Article V, of the Constitution of the United States. If, by those words was meant the *representative bodies* invested with the law-making power of the several states, which existed at the time of the adoption of the Constitution under one name or another in each of the several states, and which have ever since so existed, as distinguished from the law-making power of the respective states; there is nothing left to discuss, for with that meaning attributd to the term "the legislatures" the constitutional provision is so plain and unambiguous as not to admit of different constructions. The situation would then be that the people of the United States in framing and ratifying the Constitution in the manner provided therein "have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them, by the Congress of the United States, when two-

thirds of both houses shall propose them, or when the legislatures of two-thirds of the several states shall call a convention for proposing amendments, which, in either case, become valid, to all intents and purposes, as a part of the Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths of them, as one or the other modes of ratification may be proposed by Congress." (*Dodge v. Woolsey*, 18 How. 331, 348.) As further suggested in this connection in the case just cited, the Constitution of the United States is supreme in the matter of amendments regardless of whether or not the method prescribed thereby "be right or wrong politically."

It certainly is not in consonance with the ordinary acceptation of the term "legislature" to take it as meaning otherwise then a representative body selected by the people of a state and invested with the power of law-making for the state, whatever be the power reserved to the people themselves to review the action of that body or to initiate and adopt laws. Our owa Constitution, notwithstanding its provisions in regard to the initiative and referendum, could not be more explicit than it is in its use of the term as meaning such a representative body, and while in view of the initiative and referendum provisions the people of the state may constitute a part of the law making power of the state, they certainly are not a part of "the legislature" within the meaning of that term as used in our Constitution. By Section 1, of Article IV, of the Constitution, it is declared that the representative bodies designated as the Senate and Assembly, concerning the membership of which and the method of selecting the members Article IV makes provision, shall be designated "The Legislature of the State of California," and over

and over again, wherever in the Constituion the legislature is referred to, it obviously and necessarily means, this representative body provided for therein which is made up of the Senate and assembly designated as above stated. The initiative and referendum provisions constitute simply a reservation of power *in the people* to propose and enact laws *independent* of "*the legislature*," and to adopt or reject any act of "*the legislature*." This has always been the meaning ordinarily attributed to the term in this country, and it is difficult indeed to conceive that the makers of the Constitution of the United States in providing for ratification "*by the legislature* of three-fourths of the several states or by *conventions* in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress," intended by the words "the legislatures" anything other than the represntative law-making bodies of the several states. At the time of the adoption of the federal Constitution, as is shown by the brief of learned counsel for petitioner, every state had such a body, existing under one name or another, and, of course, it was to be assumed that in accord with our guaranteed republican form of government each state would always have such a body. Just what this *body* should be, what called, how constituted, whether bicameral in form or not, was a matter for each state to determine, but the essential characteristic of the thing was that it was a representative official body, invested with the functions of law-making, the legislative official body of the state. That this conception of the meaning of the term was in the mind of the framers of the Constitution is shown by other provisions. Section 2, of Article 1, providing that the House of Representatives shall be composed of members chosen by the people of the several states,

the state constitution, and including the people of the state when authorized to act in view of referendum provisions contained in the state Constitution. The same conclusion was reached by the Supreme Court of Ohio in the *State v. Hildebrant*, 94 Ohio St. 154, but the decision in that case was also based on another ground, viz: the supremacy of an act of Congress which made the old districting act in Ohio the only effective method of electing members of Congress "until such state shall be redistricted *in the manner provided by the laws thereof.*" It was held that the Congress in enacting its paramount law on the subject (Sub. 1, Section 4, Article 1) intended to provide that the old districting act of the state should remain in force until a redistricting was had in all respects as contemplated by the laws of Ohio, and that the insertion of the words we have italicized was for the very purpose of authorizing a resort to the referendum which was provided for in the Constitution of Ohio, as seemed apparent from the debates in Congress on the adoption of the act. It was on this ground alone that the decision of the Ohio court was affirmed by the Supreme Court of the United States. (*State v. Hildebrant*, 241 U. S. 565.) That in view of that part of Sub. 1 of Section 4, of Article 1, clothing the Congress with paramount power to make regulations in this matter, the act of that body was a valid enactment unless to include the referendum in the scope of legislative power was a violation of the guaranty of a republican form of government, appears to have been conceded, and the suggestion that it was beyond the power of the Congress in that it disregarded this constitutional guaranty, was disposed of under the settled rule that such a question presents no justiciable controversy but involves

the exercise by Congress of the authority vested in it by the Constitution. (*Pacific Telephone Co. v. Oregon*, 223 U. S. 118.)

The alternative method of ratification which the Congress was given power by Article V to provide, implies that in the use of the words "the legislatures," etc., in the same article, these representative bodies were meant. The ratification was to be "by the legislatures," etc., or "by conventions (necessarily representative bodies) in three-fourths," etc., "as the one or the other mode of ratification may be proposed by the Congress." In each case it was a ratification by a *representative body* which, it was assumed would correctly express the desire of the people of the state as to approval or rejection of the proposed amendment, and was apparently contemplated. The use of the words "by *the legislatures* of three-fourths," etc., itself implies this meaning. The words imply some official body of a state and distinguished from the state itself or the people of the state or the whole law-making power of the state. If anything differing from the ordinary conception of the term had been intended, or anything different from its plain and obvious meaning as used elsewhere in the Constitution in many instances, and so far as we can see in every other instance, it seems fair to assume that words indicating that meaning would have been used. It was said in *McPherson v. Blacker*, 146 U. S., at page 27, "The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids of interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text." It is true enough that with regard to proposed amendments the idea was that each *state* should speak for itself in the matter of ratification by voting yea or nay

thereon. But the further question considered by the framers of the Constitution was *in what manner the state* should *give its vote*, for that after all is what the state is doing when it joins i nthe ratification of a proposed amendment to the federal Constitution, and, as in the case of the selection of senators from each state, the people of the United States saw fit to provide that the vote should be given by "the legislature" of the state, doubtless concluding, whether correctly or not, that in this way the real desire of the people of the state would be correctly expressed. The adoption during recent years in many states of the initiative and referendum, of course, implies, as did the amendment of the federal Constitution with relation to the selection of United States Senators, a conclusion on the part of very many people, that the representative body known as the legislature cannot always be relied on to express the real desire of the people of a state, but this view in so far as it finds expression in constitutions or statutes is certainly a matter of comparatively recent origin. We must continually bear in mind that our sole question in this connection is what did *the framers of the Constitution* intend by the term "the legislatures of * * * the several states" in Article V, and that if by the term they intended the representative official bodies to which we have referred, as we think must be held, a state has no power to prescribe for itself a different ratifying power. All questions as to the good policy of such a provision, or whether it is in accord with the view entertained by very many today that the people of a state should have a vote as such a matter, are beside the question. The people of the United States in framing and enacting the Constitution have ordained in Article 5 thereof in language that we think admits of only one rea-

sonable construction, that in the matter of ratifying a proposed amendment the people of the respective states shall speak on the question of ratification *solely and finally through their official representative legislative bodies,* where the Congress in submitting the amendment proposes that method of ratification.

Our conclusion in this matter is in accord with that reached by the Supreme Court of Maine on this very question. (See In Re opinion of the Justices, 107 Atl. Rep. 673.) It is opposed to the conclusion of the Supreme Courts of Washington and Ohio. (*State v. Howell,* (Wash.), 181 Pac. Rep. 920; *Hawke v. Smith,* (Ohio), decided September 30th, 1919.) In each of these cases there was a dissenting opinion. In the Washington case, the prevailing opinion, written by Mr. Chief Justice Chadwick, exhaustively and forcefully presents the argument for a contrary conclusion. It seems to us, and we say it with the utmost respect for the learned judges who have reached a conclusion differing from ours, that the argument in support of their conclusion is in the final analysis based more upon some present day conceptions of what the law in this regard ought to be, than upon the intention of the framers of the Constitution *as expressed therein,* and to our mind expressed so clearly as to preclude any other conclusion than the one we have reached. Of course, all will admit that in so far as the question before us is concerned, the words of Article V here involved, must be taken today to mean exactly what they meant when originally written into the Constitution, regardless of any change in view as to the wisdom of the policy of such a provision. In other words, if they the meant the official *representative law-making body* of the state, they mean

the same thing today, with the result that a change in the method can properly be accomplished only by amending the law.

In view of our conclusion on the question we have discussed, we deem it unnecessary to discuss the other question presented.

The alternative writ heretofore isued is discharged and the proceeding dismissed.

VIII.

OPINION OF THE SUPREME COURT OF MICHIGAN.

IN RE ARTHUR DECHER, CHARLES W. DITTMAR AND GUSTAV C. DUST, RELATORS, V. COLEMAN C. VAUGHAN, SECRETARY OF STATE, RESPONDENT.

Sharp, J., Chief Justice Moore and Justices Steers, Brooks, Fellows, Stone, Clark and Bird, concurring:

At the regular session of the legislature of the State of Michigan, in 1919, a resolution, ratifying a proposed amendment to the Constitution of the United States providing for national prohibition, was adopted. A petition in proper form, asking that such resolution be submitted to the electors for adoption or rejection under the referendum provision in our state Constitution, was presented to the respondent, who, on the advice of the attorney general, declined to act upon the same, and mandamus is sought to compel him to do so. In his return to the order to show cause granted by this court, the respondent admits the facts stated in the petition to be true, but denies the right of the relators to relief for the following reasons:

1. That the Congress of the United States, pursuant to the provisions of Article V, of the Constitution of the United States, proposed said amendment and directed that the same be submitted to the legislatures of the several states for ratification.

2. That the action of the legislature of the State of Michigan ratifying said amendment in accordance with the direction of the Congress of the United States is final and not subject to referendum.

Article V, Section 1, of our State Constitution, reads as follows:

> The legislative power of the State of Michigan is vested in a senate and house of representatives; but the people reserve to themselves the power to propose legislative measures, resolutions and laws; to enact or reject the same at the polls independently of the legislature; and to approve or reject at the polls any act passed by the legislature, except acts making appropriations for state institutions and to meet deficiencies in state funds. The first power reserved by the people is the initiative. * * *
>
> The second power reserved to the people is the referendum. * * *

The prohibition amendment was proposed and submitted by the national congress under the provisions of Article V, of the Constitution of the United States, which reads as follows:

> The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of

> the several states, or by conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no amendment which may be made prior to the Year One Thousand Eight Hundred and Eight shall in any manner affect the first and fourth clauses in the Ninth Section of the first Article; and that no state, without its consent, shall be deprived of its equal Suffrage in the Senate.

The questions presented are:

1. Does the word "legislature" in the provision of the federal Constitution and in the joint resolution of congress mean "the legislative assembly" or "the legislative authority of the state?"

2. Does the word "act" in the referendum provision of the state Constitution include the action of the legislature in adopting such a joint resolution?"

Official notice of the ratification by the requisite number of states has been received by the secretary of state, and the amendment is now treated by that and the other departments of the national government as a part of the Constitution. The congress has so recognized it by the passage of a law (the Volstead Act, approved October 28, 1919,) for its enforcement.

1. It is elemental that the people of any one state cannot, by any provision in its Constitution or laws, amend the federal Constitution. It was adopted as the supreme law of the republic by the people of all the states, and can be changed only in the manner provided therein. It follows, therefore, that we must look to it alone in determining how such amendment shall be proposed, ratified and adopted. If the language providing therefor is plain and unambigious, and had a well-defined meaning at the time

of its adoption, no one state can give it an interpretation to suit the desire of its people. As was said by Chief Justice Marshall in *Cohens v. State of Virginia*, 6 Wheat. 264:

> The people made the Constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will. But this supreme and irresistible power to make or to unmake, resides only in the whole body of the people; not in any sub-division of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it.

Justice Story has also said:

> When its words are plain, clear and determinate, they require no interpretation and it should therefore be admitted, if at all, with great caution and only from necessity either to escape some absurd consequence or to guard against some fatal evil. Story on Constitution. ————

In an early case in this court (*Bay City v. State Treasurer*, 23 Mich. 499), Mr. Justice Cooley, at page 506 said:

> Constitutions do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberative action. * * * They the courts) must construe them as the people did in their adoption, if the means of arriving at that construction are within their power.

The purpose of the Constitution was to establish a representative form of government, not a pure democracy in which all power is exercised by the people acting as a whole. While it provides for a popular branch of the legislative department, to be elected at short intervals by the vote of those entitled to the elective franchise in

the several states, it is suggestive that neither the president, vice-president, nor United States senators, are to be so elected. It is also significant that when there was a popular demand that senators should be elected it was not deemed sufficient to provide in the state constitutions for a referendum in making the selection, although the Constitution provided that they "should be chosen by the legislature," but an amendment to the federal Constitution, the seventeenth, was adopted therefor.

The term "legislature" is thus defined:

> That body of men which makes the laws for a state or nation. Bouvier's Law Dictionary (Rawle's Ed.) 17.

And "legislative power" as—

> Authority exercised by that department of government which is charged with the enactment of law as distinguished from the executive and judicial functions. The law-making power of a sovereign state.

Counsel for the relators insist that under our state Constitution—

> The power to legislate is vested in both the Constituent Assembly and the electors themselves.

—that in writing Article V, of the federal Constitution, its framers intended to submit an amendment to such legislative power for ratification, and not merely to the legislative body known as the legislature.

We cannot but think that such an interpretation does violence to the plain meaning of the word legislature as understood at the time the federal Constitution was adopted. There were then law-making bodies, always referred to as "legislatures," in all of the colonies which under the constitution afterwards became states. This term is fre-

quently used in the Constituion, and an examination will reveal the fact that in most cases it could not be applied other than to such assemblies.

It is suggested that the intent of the Constitution is simply "to call the roll of states and get an expression from each state as to its will and desire." In what way shall such an expression be voiced? The Constitution says by the "legislatures." In making response, the members act collectively and when a majority of those constituting such bodies respond in the affirmative, and such action is certified to the federal authorities by a sufficient number of states, the amendment is adopted and is thereafter a part of the Constitution.

The action of the legislature in ratifying an amendment is not, strictly speaking, a legislative act. It is but one of several steps required to be taken to change the federal Constitution. The congress, or the states by petition, must first propose an amendment. In order that it may become operative, it must receive the assent of the states by ratification in the manner provided in Article V. How shall such assent be expressed? By the adoption by the state legislature of a joint resolution ratifying the amendment. The state thus participates in the making of a new law simply by expressing its assent, thereto in the manner provided. It has not thereby enacted a law any more than the President or Governor does so by approving bills passed by the congress or legislature.

The language of Article V, of our state Constitution, negatives the claims of relators. It provides: "The legislative power of the State of Michigan is vested in a senate and house of representatives." This is followed by the provisions relating to the referendum wherein the right "To approve or reject at the polls any act passed by

the legislature" is reserved to the people. The framers of this instrument thus clearly distinguish between the legislative power vested in the legislature and the legislature itself. The former embraces the right to enact legislation, the latter the body in whom such right is primarily vested. Under the provisions which follow as to initiative and referendum, the people have no power to enact legislation until the proposal therefor has been submitted by petition to the legislature for action thereon. The right of the people to thus legislate in no way makes them a part of the legislature or changes the well-recognized meaning of that term.

Reliance is placed by counsel for relators on the decision in *Davis v. Hildebrant*, 94 Ohio St. 154, affirmed by the Supreme Court of the United States as *Davis v. Ohio*, 241 U. S. 565, in which the referendum provision of the Ohio Constitutions was held to apply to an act of the legislature redistricting the state for congressional purposes. The provision in the federal Constitution relating thereto reads:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators. Article 1, Section 4.

In pursance of the authority therein conferred, congress in 1842 provided for the election of representatives by districts, and in 1891 provided that the existing districts should continue in force "until the legislature of such state, in the manner herein prescribed, shall redistrict such state." An amendment in 1911 provided that the redis-

tricting should be made by a state "in the manner provided by the laws thereof." In discussing these provisions, Mr. Chief Justice White said:

> The legislative history of this last act leaves no room for doubt that the prior words were stricken out and the new words (in the manner provided by the laws thereof) inserted for the express purpose, in so far as Congress had power to do it, of excluding the possibility of making the contention as to referendum which is now urged.

The laws of the state include the constitution as well as the statutes, and when congress provided that the redistricting should be made "in the manner provided by the laws" of the states, the provision in the state Constitution for a referendum on the action of the legislature could not but apply. We do not think this decision places any interpretation upon the word "legislature" as used in this Constitutional provision. It simply holds that, as congress was given the power to regulate the action of the states in redistricting ,it might confer upon the states the righ to provide therefor "in the manner provided by the laws" of each state and that the law of Ohio included the referendum provision of its Constitution.

The case of *McPherson v. Blacker*, 146 U. S. 1,(an appeal from this court, 92 Mich. 377), involving the power of the state legislature to provide for the selection of presidential electors by districts under Article II of the federal Constitution, is instructive. The question here presented was not directly considered, but the power of the legislature under that article was discussed at length. In the opinion, Mr. Chief Justice Fuller quotes approvingly the language employed by Senator Morton, chairman of the committee on privileges and elections, in a

report presented by him to the senate relating to the power of the legislature to provide for the selection of such electors, in which it is said:

> This power is conferred upon the legislatures of the states by the Constitution of the United States, and cannot be taken from them or modified by their state Constitutions any more than can their power to elect senators of the United States. Whatever provisions may be made by statute, or by the state Constitution, to choose electors by the people, there is no doubt of the right of of the legislature to resume the power at any time, for it can neither be taken away nor abdicated. Senate Rep. 1st Sess. 43 Cong. No. 395.

In Watson Const., Vol. 2, page 1310, the writer says:

> Whether an amendment is proposed by congress, or by a convention, it is ratified or rejected by the representatives of the people either in the legislatures or in conventions and not by the people voting on it directly. The people have to direct power either to propose an amendment to the Constitution, or to ratify it after it is proposed and submitted.

Several of the state courts of last resort have had occasion to pass on this question. In *State v. Howell*, 181 Pac. 920, the Supreme Court of Washington, by a divided court, held that the resolution of ratification was subject to the deferendum provisions of the state Constitution. In *Hawke v. Smith*, ——— Ohio ———, there was a similar holding, one of the justices dissenting therefrom. On the other hand, the Supreme Court of Maine in In Re Opinion of the Justices, 107 Atl. 673, decided otherwise. It was therein said:

> Here, again, the state legislature in ratifying the amendment, as congress in proposing it, is not, strictly speaking, acting in the discharge of legislative duties and functions as a law-making body, but is acting in behalf of and as representative of the people as a ratifying body, under the power expressly conferred upon it by Article 5. The people, through their Constitution, might have clothed the senate alone, or the house alone, or the Governor's Council, or the Governor, with the power of ratification, or might have reserved that power to themselves to be exercised by popular vote.

The same view was taken in *Herbring v. Brown* (Or.), 180 Pac. 328. Our attention is also called to the decision of the district court of Lancaster county, Nebraska, supporting relators' contention, and that of the United States District Court, for the northern district of California, in which the opinion of the Maine judges is quoted approvingly and followed.

The people in any state may, in their Constitution, reserve to themselves the right to initiate and defeat state legislation by their vote. To the extent and in the manner therein provided they, acting in conjunction with the legislature, constitute the law-making power of the state. Each state, however, can participate in amending the federal Constitution only in the manner provided therein. If the people want to secure the right to ratify amendments by popular vote thereon, they may do so by an amendment which shall so provide, but such power rests only in the people themselves and should not be usurped by the courts through a judicial interpretation of the instrument itself.

It is our conclusion that the word "legislature," as em-

ployed in Article V, of the federal Constitution, was intended by its framers to mean the representatives of the people, elected to make the laws of the several states, when acting as a body, and that a state has no power through its Constitution or by statute to restrict this action of the legislature subjecting it to a review by popular vote.

2. Under the referendum provision of our state Constitution, the people reserve to themselves the right "to approve or reject at the polls any act passed by the legislature, except acts making appropriations for state institutions and to meet deficiencies in state funds." Is the ratifying resolution an "act" within the meaning of this provision?

The construction to be placed on it should not be technical. This court should give effect to the purposes indicated by a fair interpretation of the language used. At the same time, we must bear in mind that it is to be presumed that the framers of the Constitution employed words in their natural sense. The word "act," when employed in legislation, has had a well defined meaning since our first Constitution was adopted. When a proposed law is introduced in the legislature, it is called a "bill." When the bill is passed and approved and becomes a law, it is called an "act." The clause by which it is given life and effect uniformly reads: "The people of the State of Michigan enact." As pertaining to legislation, "act" defined by Bouvier, Vol. I (Rawle's Ed.), page 79, as—"A statute or law made by a legislative body." These applications, "bill" and "act," are frequently used in our state Constitution: "Every bill shall be read three times in each house before the final passage thereof." Section 23, Article V. "Every bill passed by the legislature shall

be presented to the governor before it becomes a law." Section 36, Article V. "No act shall take effect or be in force until the expiration of ninety days, etc." Section 21, Article V. "No local or special act shall take effect until approved by a majority of the electors, etc." Section 30, Article V. Section 38 reads:

> Any bill passed by the legislature and approved by the governor, except appropriation bills may be referred by the legislature to the qualified electors; and no bill so referred shall become a law unless approved by a majority of the electors voting thereon.

Such laws are referred to in Section 1 or Article V, as "Acts adopted by the people."

It thus appears that the framers of the Constitution, by the use of the word "act" in Article V, had in mind a statute or law passed with the formality required by the Constitution and approved by the governor. It is suggestive that while, under the provision of the Constitution relied on, the people using the initiative have "the power to propose legislative measures, resolutions and laws," the power under the referendum is limited "to approve or reject at the polls any act passed by the legtion for a referendum on the actio nof the legislature could islature, except, etc." While an amendment to the Constitution, after ratification by a sufficient number of states, becomes a part thereof and is thereafter the supreme law of the land, the action of the state legislature in ratifying it is not the making of a law or an "act" as understood in legislative parlance.

This question has been considered by the following courts: In *Moulton v. Scully*, 111 Me. 428, that court says:

> The referendum applies and was intended to apply only to acts or resolves of this class, to every bill or resolution having the force of law, that is, to what is commonly known as legislative acts and resolves, which are passed by both branches, are usually signed by the governor and are embodied in the legislative acts and resolves, as printed and published.

In In re Opinion of the Justices, 107 Atl. Rep. 673, the same court says:

> This resolution, ratifying the proposed constitutional amendment, was neither a public act, a private act, nor a resolve having the force of law. It was in no sense legislation. It was not signed by the Governor, nor could it have been vetoed by him. It was simply the ratifying act of the particular body designated by Article 5 of the federal Constitution to perform that particular act.

See also, *Hopping v. Richmond*, 170 Cal. 605 (150 Pac. 977); *Herbring v. Brown* (Or.), 180 Pac. 328; *Whittemore v. Terral*, (Ark.), 215 S. W. Rep. 686.

To the contrary, see *State v. Howell, supra.* The decision of the Ohio Supreme Court in *Hawke v. Smith, supra,* has no bearing on the question as the Constitution of that state expressly provides for a referendum on the action of the general assembly in ratifying any such proposed amendment.

It follows that the respondent was justified in refusing to act on the petition for a referendum, and the writ of mandamus is denied without costs.

FILED
FEB 7 1920
JAMES D. MAHER,
CLERK.

BRIEF OF PLAINTIFF IN ERROR

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 601

GEORGE S. HAWKE,
Plaintiff in Error,
v.
HARVEY C. SMITH, AS SECRETARY OF STATE OF OHIO,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

(27356)

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Supreme Court of the United States

OCTOBER TERM, 1919.

GEORGE S. HAWKE,
Plaintiff in Error,
v.
HARVEY C. SMITH,
As Secretary of the State of Ohio,
Defendant in Error.

No. 601.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

STATEMENT OF THE CASE.

This case is in this Court upon a writ of error duly allowed by the Chief Justice of the Supreme Court of the State of Ohio. (R. 4.)

It is an action by the plaintiff in error, George S. Hawke, as a citizen, taxpayer and an elector of the State of Ohio, to enjoin the defendant in error, Harvey C. Smith, as Secretary of the State of Ohio, from submitting to the electors of the State of Ohio, at the election to be held in November, 1920, a referendum on the action of the General Assembly of the State of Ohio ratifying the Amendment proposed by the Sixty-sixth Congress of the United States to the Constitution of the United States providing that "the right of citizens of the United States to vote shall not be denied or abridged by the United

States or by any State on account of sex," popularly known as the Woman Suffrage Amendment; and from expending any money out of the public funds of the State of Ohio in preparing and having printed forms of ballot for the submission of said referendum on said act of said General Assembly, and from spending any money out of the public funds of said State for the purpose of preparing, printing and mailing to the electors of the State arguments on said referendum proposal. (R. 18.)

The case was filed in the Court of Common Pleas in Franklin County, Ohio. (Amended petition, R. 14.)

The defendant demurred to the amended petition upon the ground that the facts alleged in said petition are not sufficient to constitute a cause of action and that the Court had no jurisdiction of the subject matter. (R. 19.)

The Court found that the demurrer was well taken and should be sustained. The plaintiff refusing to plead further, the case was dismissed and judgment rendered against the plaintiff for costs. (R. 13.)

A proceeding in error was taken from the Common Pleas Court of Franklin County to the Court of Appeals of said County in which Court the judgment of the Court of Common Pleas was affirmed. (R. 11.)

From this judgment the plaintiff went to the Supreme Court of the State of Ohio on a petition in error assigning as errors:

1. That the Court of Appeals erred in rendering judgment affirming the judgment of the Court of Common Pleas.

2. That the Court of Appeals erred in its judgment that there was no error in the judgment and proceedings in the Court of Common Pleas.

3. That the Court of Appeals erred in rendering judg-

ment against the plaintiff affirming the judgment of the Court of Common Pleas. (R. 9.)

The Supreme Court of the State of Ohio affirmed the judgment of said Common Pleas Court and of said Court of Appeals. (R. 8.)

Thereupon the plaintiff filed his petition praying for the allowance of a writ of error to the Supreme Court of the United States and filed therewith his assignments of error, which writ of error was duly allowed. (R. 2, 3.)

Writ for order for allowance of writ of error was duly issued by Hon. Edward D. White, Chief Justice of United States. (R. 4, 5.)

The questions at issue in this Court arise on the judgment of the Supreme Court of Ohio affirming the judgment of the Court of Appeals of Franklin County, Ohio, and the judgment of the Common Pleas Court of said county in sustaining the demurrer of the defendant in error to the amended petition of the plaintiff in error and involve the validity of the provisions of the Ohio State Constitution permitting the holding of a referendum election by the electors of that State on the act of the General Assembly of the State of Ohio ratifying an Amendment to the Constitution of the United States duly proposed by the Congress of the United States.

The provisions of the Ohio Constitution under which the referendum election is sought, are as follows:

> "Be it resolved by the people of the State of Ohio: The people also reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States.
>
> "No such ratification shall go into effect until ninety days after it shall have been adopted by the General Assembly. When a petition signed by six percentum of the electors of the State, as is pro-

> vided for a referendum on laws passed by the General Assembly, shall have been filed with the Secretary of State within ninety days after said ratification by the General Assembly, ordering that such ratification be submitted to the electors of the State for their approval or rejection, the Secretary of State shall submit to the electors of the State for their approval or rejection said ratification in the manner provided for the submission by referendum of a law passed by the General Assembly, and said action of the General Assembly ratifying the said amendment to the Constitution of the United States shall not go into effect until and unless approved by a majority of those voting upon the same. All the provisions of this Article on the subject of the referendum upon laws passed by the General Assembly shall apply hereto, so far as the same are applicable, except that the General Assembly may not declare its ratification of a proposed amendment to the Constitution of the United States an emergency act not subject to the referendum."
>
> Ohio Const., Art. 2, Secs. 1 and 1a.

The plaintiff in error alleges in his amended petition, filed in the Common Pleas Court of Franklin County, and here raises and urges the invalidity of the foregoing provision of the Ohio State Constitution on the ground that it is in conflict with Article V of the Constitution of the United States providing for the amendment of that instrument and which reads as follows:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of the several states, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Convention in three-

> fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the year One Thousand Eight Hundred and Eight shall in any Manner affect the first and fourth clauses of the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

The plaintiff also alleged in his petition, filed in said common pleas court, and here raises and urges, the invalidity of said referendum provision in the constitution of said state on the ground that such provision is in contravention of the provisions of the Ordinance of 1787 providing as a part of the compact therein that the states formed out of the Northwest Territory should have a republican form of government, in that such referendum provision violates the essential principles of republican or representative form of government, and that said referendum provision of the constitution of said state violates the provision of the Deed of Cession of 1784, from the State of Virginia to the United States, of the Northwest Territory and the provisions of the Virginia Act of Ratification of 1788, ratifying the act of Congress accepting the said cession of said territory and the provisions of the Enabling Act of Congress authorizing Ohio to elect representatives to form a constitution and frame a government which provided that such government shall be republican in form and not repugnant to the provisions of the Ordinance of 1787, and as accepted by the people of the state of Ohio in the preamble to the Ohio state constitution of 1802, and of the act of congress of 1803 admitting Ohio into the Union as a state and ratifying the republican form of government created by the constitution of Ohio of 1802.

ERROR RELIED UPON.

The error relied upon in this court is the action of the Supreme Court of Ohio in affirming the judgment of the Court of Appeals of Franklin County sustaining the judgment of the Court of Common Pleas of said county in sustaining the demurrer of the defendant in error to the amended petition of the plaintiff in error filed in said Court of Common Pleas and in dismissing said petition and rendering judgment against the plaintiff in error for costs.

POINTS OF LAW AND AUTHORITIES RELIED UPON.

1.

The amendment of the Federal Constitution as to substance, form and manner is exclusively a Federal question and the right to participate therein is derived from and dependent upon the Federal Constitution.

a. Article V, Federal Constitution;
b. Jameson, Const. Conventions, (4th ed.), Sections 582 and 583;
c. Watson on Const., 1310;
d. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, p. 288.

2.

The Constitution of the United States provides the manner of its own amendment and the degree and manner in which the several states may participate therein.

a. Article V, Federal Constitution;

b. Jameson, Const. Conventions, (4th ed.), Sections 582 and 583;
c. Watson on Const., 1310;
d. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, p. 288.

3.

The word "legislature" as used in Article V of the Federal Constitution, means the general assembly of a state or representative law making body chosen by the people.

a. Black on Interpretation of Laws, pages 15 and 16;
b. *Walker v. City of Cincinnati*, 21 O. S., 14 (53);
c. *State ex rel., etc. v. Hildebrand*, 241 U. S. 565;
d. Art. 1, Sec. 4, Paragraph 1, Federal Constitution;
e. Art. 1, Sec. 3, Paragraphs 1 and 2, Federal Constitution;
f. Willoughby on the Constitution, p. 20, Sec. 20;
g. Art. 1, Sec. 2, Paragraph 1, Federal Constitution;
h. Art. 11, Sec. 1, Paragraph 2, Federal Constitution;
i. 17th Amendment, Federal Constitution;
j. Report of Committee of U. S. Senate on Privileges and Elections in re Contest of Charles J. Faulkner, W. Va., 1888, confirmed by Senate;

k. Recent Wisconsin Supreme Court case interpreting Sec. 3 of Art. 1, of Federal Constitution;

l. *State v. Frear*, 125 N. W., 961;

m. Art. IV, Sec. 3, Paragraph 1, Federal Constitution;

n. Art. IV, Sec. 4, Federal Constitution;

o. The Federalist.

p. Four Elliott's Debates, 2nd ed. 182, 183;

q. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, pp. 288, 289;

r. Art. 6, Federal Constitution.

4.

The history of the Constitutional Convention and a study of its debates and those of the state conventions ratifying the Federal Constitution and the general acceptance, use and understanding of the word "legislature" at the time of the formulation and adoption of the Constitution, conclusively show that the makers of the Constitution intended to delegate the power of ratification to the general assemblies or representative law making bodies of the several states composed of members elected by the people of such states.

a. Declaration of Independence;

b. Articles of Confederation;

c. Adams' Works, Vol. —, p. 508;

d. Proceedings of Constitutional Convention, 1787;

e. Madison's Journal, pp. 97, 111, 112, 199, 200, 365, 388, 410-416, 419, 421, 435 and 542;

f. *McPherson v. Blacker*, 146 U. S., 1 (28);
g. Journal Cons. Conv., pp. 92, 190, 286 and 288;
h. Elliott's Deb., Vol. 1, pp. 156, 208, 211, 217 and 262;
i. 6 A. & E. Encycl. of L., 2d Ed., p. 906, 6 (bb), n. 3;
k. Cooley on Cons. Limitations, p. 600;
l. Watson on the Constitution, pp. 318, 319 and 320;
n. *City of Chicago v. Reeves*, 77 N. E., 237; 220 Ill., 274 (288);
o. *Western v. Ryan*, 97 N. W., 347; 70 Neb. 211 (218);
q. *State v. Cox*, O. L. R., Jan. 27, 1919, p. 475 of "Federal Decisions";
r. Art. IV, Sec. 3, Federal Constitution;
s. *Hollingsworth v. Va.*, 3 Dall., 378;
t. Elliott's Journal, Constitutional Convention, 145, 182, 149, 223, 230, 304 and 317;
u. Elliott's Debates, Vol. 3, pp. 49, 96, 97;
v. Four Elliott's Debates, 2nd Ed. 182, 183;
w. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, pp. 288, 289.

5.

Ratification of an Amendment to the Federal Constitution is not a legislative act. The power of ratification is derived from Federal and not from State authority.

a. Art. 1, Sec. 4, Federal Constitution;
b. *State ex rel., etc. v. Hildebrant*, 241 U. S., 565;
c. *McPherson v. Blacker*, 146 U. S., 1;

d. Opinion Ohio Attorney General, 1917, as to meaning of "legislature" in Art. V, Federal Constitution;
e. Elliott's Debates, Vol. 4, pp. 177 and 404;
f. 65 O. L., 280; 66 O. L. 424; 103 O. L. 974;
g. 15 U. S. S. at L. 706, and 16 U. S. S. at L. 1131;
h. Mathews' Legislative and Judicial History of the 15th Amendment, p. 68;
i. Jameson, Cons. Conv., (4th Ed.), Sec. 583;
j. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, pp. 288, 289;
k. In re Opinion of Justice, 107 Atl. (ME.), 673;
l. *State ex rel Morris v. Mason*, 43 La. Ann. 590, 9 So. 776;
m. *Commonwealth ex rel. Atty. Gen. v. Grist*, 196 Pa. State 396, 46 Atl. 505;
n. *Hollingsworth v. Virginia*, 3rd Dall. (U. S.) 378;
o. Willoughby, Const., 520, 521;
p. 2nd Watson, Const. 1318.

6.

The people of a state cannot reserve the power to act in the matter of ratification of an amendment to the Federal Constitution because the states delegated all authority to amend the Federal Constitution to the Federal Government and now possess no power of ratification other than such as has been re-delegated to them by the Federal Government and are limited in the exercise of any such re-delegated powers to the manner and form

and the agencies designated by the Federal Government in the National Constitution. The states can not reserve what they do not possess.

a. Part of Sec. 1, Art. II, Ohio Constitution, adopted Nov. 5, 1918;
b. 10th Amendment of Federal Constitution;
c. Art. V, Federal Constitution;
d. Jameson Cons. Conv., (4th Ed.), Sec. 583;
e. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, pp. 288, 289;
f. In re Opinion of Justice, 107 Atl. (ME.), 673;
g. *State ex rel. Morris v. Mason*, 43 La. Ann. 590, 9 So., 776;
h. *Commonwealth ex rel. Atty. Gen. v. Grist*, 196 Pa. State 396, 46 Atl. 505;
i. *Hollingsworth v. Virginia*, 3rd Dall. (U. S.) 378;
j. Willoughby, Const. 520, 521;
k. Second Watson Const. 1318.

7.

Under the Constitution, Congress alone may choose the mode of ratification and is empowered "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

a. U. S. Constitution, Art. V.;
b. U. S. Constitution, Sections 8 and 18, Art. 1;
c. Thayer, Legal Essays, 7-13;
d. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, p. 290.

e. Proclamation of U. S. Sec. of State, Jan. 29, 1919, and like proclamations proclaiming the ratification of former amendments.

11.

The Federal Constitution is the supreme law of the land, and as such, the courts are bound to support it. Any provision in a state constitution in conflict with or in contravention of the Federal Constitution is void.

a. Art. VI, Federal Constitution;
b. *Hauenstein v. Lybham*, (1879), 100 U. S. 483; 25 U. S. (L. Ed.), 628;
c. *Montgomery v. State*, (1908), 55 Fla. 97, 45 So., 879;
d. Minority opinions of court in recent Washington case similar to present case;
e. Jameson, Cons., Conv., 4th Ed., Sec. 583;
f. *State ex rel. Schrader v. Polley, etc.*, 26 S. D., 5;
g. *State ex rel. Davis v. Hildebrant*, 94 O. S. 154, 241 U. S. 565;
h. Art. 1, Sec. 4, Federal Constitution;
i. *State ex rel. Case v. Howell, etc.*, 85 Was. 281 and 294;
j. Amendment XXXI of Art. IV, Maine Constitution;
k. Art. V, Federal Constitution;
l. *Hollingsworth v. Va.*, 3 Dall., 378;
m. *State v. Dahl*, (N. D.), 34 L. R. A., 97;
n. Preamble, Federal Constitution;
o. *Chisholm v. State*, 2 Dall., 419;
p. *Martin v. Hunter's Lease*, 1 Wheat., 304, 325;

q. 4 Elliott Deb., 176, 177;
r. *Dodge v. Woolsey*, 18 How., 331, 348;
s. Watson on Const., Vol. 2, pp. 1310 and 1315;
t. *Moulton v. Soully*, 111 Maine, 438, 446;
u. *Horbring v. Brown*, 180 Pac. Rep., 328;
v. U. S. Rev. Stat., Sec., 205;
w. Appendix, Part 2, U. S. Stat., 3rd Session, 65th Congress, 1918, 1919.

12.

The Ordinance of 1787 consists of three parts: First. The titles to estates. Second. Sections relating to temporary matters. Third. Six fundamental articles of compact expressly made permanent, to remain forever unalterable.

Letter of Nathan Dane, Proceedings of Massachusetts Historical Society;
Virginia Resolution of Cession, Hening's Statutes, Va., v. 10, p. 564;
Virginia Act of Cession, Hening's Statutes, Va., v. 11, p. 326;
Act of Confederation Congress, September 13, 1783, Journal 8, pp. 254-260;
Virginia's Deed of Cession, Hening's Statutes, Va., v. 11, p. 571;
Confederation Congress Revision, Act of Cession, July 7, 1786;
Ordinance of 1787, 1 L. U. S. 475;
Modified Cession of Virginia, Hening's Statutes, Va., v. 12, p. 780;
Act of Congress, Ohio Territory, United States Statutes-at-large, Chap. 8, p. 50;

Congressional Enabling Act for Ohio, United States Statutes-at-large, v. 2, p. 173;

Convention Ordinance by Ohio Delegates;

Constitution of Ohio;

Act of Congress Recognizing State of Ohio, United States Statutes-at-large, v. 2, p. 201;

Article 6, Constitution of the United States;

Hutchinson v. Thompson, 9th Ohio 62.

13.

That part of the Ordinance of 1787 containing the covenant or compact between the State of Virginia, the National Government and the people of the Northwest Territory, is still alive and binding upon the people inhabiting the states carved from such territory and upon the states themselves, and any provision in the Constitution of any one of such states in conflict with the provisions of the Ordinance is void.

Hogg v. Zanesville, 5 Ohio 416;

Betts v. Wise, 11 Ohio 219;

Hutchinson v. Thompson, 9 Ohio State 62;

Lyon v. Lyon, 1 O. C. C. (N. S.), 246;

Cochran's Heirs v. Loring, 17 Ohio 425;

State v. Boone, 84 O. S. 346;

Cox v. State, 3 Blackford, (Indiana) 193;

Spooner v. McConnell, 1 McLean 337;

Palmer v. Commissioners, 3 McLean 226;

Vaughan v. Williams, 3 McLean 530;

Jolly v. Terre Haute, 6 McLean 235;

Williams v. Beardsly, 2 Ind. 596;

Depew v. Wabash, 5 Ind. 8;

Henthorn v. Doe, 1 Blackf. 157;
Giddings v. Blackner, 52 N. W. 946;
Phoebe v. Jay, 1 Breese 268;
Milwaukee v. Schooner, 23 Wis. 144;
Wisc. v. Lyons, 30 Wis. 61;
Atty. Gen. v. Eau Claire, 37 Wis. 400.

14.

The referendum provision in the Ohio Constitution is invalid, being in contravention of the compact between the State of Virginia, the United States, and the people of the Northwest Territory, under which the State of Virginia ceded that territory to the United States, with the covenant that the States formed from said territory should "be distinct republican states."

Virginia Resolution of Cession, Hening's Statutes, Va., v. 10, p. 564;

Virginia Act of Cession, Hening's Statutes, Va., v. 11, p. 326;

Act of Confederation Congress, September 13, 1783, Journal 8, pp. 254-260;

Virginia's Deed of Cession, Hening's Statutes, Va., v. 11, p. 571;

Confederation Congress Revision, Act of Cession, July 7, 1786;

Ordinance of 1787, 1 L. U. S. 475;

Modified Cession of Virginia, Hening's Statutes, Va., v. 12, p. 780;

Act of Congress, Ohio Territory, United States Statutes-at-large, Chap. 8, p. 50;

Congressional Enabling Act for Ohio, United States Statutes-at-large, v. 2, p. 173;

Convention Ordinance by Ohio Delegates;
Constitution of Ohio;
Act of Congress Recognizing State of Ohio, United States Statutes-at-large, v. 2, p. 201;
Article 6, Constitution of the United States.

15.

Injunction against the calling of a referendum election on the act of the Legislature of a state ratifying an amendment to the Federal Constitution is a proper remedy and may be invoked by a citizen who is a taxpayer and an elector.

a. *State v. Superior Court*, 92 Was., 16, 159 Pac. Rep., 92;
b. *State v. Alcott*, 62 Oreg., 277, 125 Pac. Rep., 303;
c. *Rickey v. Williams*, 8 Was., 479, 36 Pac. Rep., 480;
d. *Kricachel v. Com.*, 12 Was. 428;
e. *State v. Roach*, 230 Mo., 408;
f. *Crawford v. Gilchrist*, 64 Fla., 41, 59 So. 964;
g. *State v. White*, 36 Nev., 334, 136 Pac. Rep., 110;
h. *Spear v. People*, 52 Col., 325, 122 Pac. Rep., 768;
i. Professor Dodd on Division and Amendment of State Constitutions, p. 232;
j. *Ellingham v. Dye*, 172 Ind., 336;
k. *State v. Hall*, 35 N. Dak., 34, 159 N. W., 281;

l. *Mayer v. Hughes*, 36 S. E., 247, 110 Ga., 804;

m. *De Kalb v. Atlanta*, 65 S. E., 72, 132 Ga., 727;

n. *Tolbert v. Long*, 67 S. E., 826, 134 Ga., 292;

o. *Lynchburg v. Com.*, 109 N. C., 159;

p. *Hood v. Sutton*, 94 S. E., 686;

q. *International Trading Stamp Co. v. Memphis*, 101 Tenn., 181, 47 Southwest, 136;

r. *Layton v. Mayer*, 23 South, 99;

s. *Brown v. Trousdale*, 138 U. S., 389, 11 Sup. Court, 308.

BRIEF OF ARGUMENT.

1. Authority to Amend the Federal Constitution is Federal and not State.

There is but one authority, by or under which, an amendment to the Federal Constitution can be made. That authority is Federal, and not state. It is found in Article V of the Federal Constitution. In it alone—within these lines and not elsewhere:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing amendments; which, in either case, shall be valid, to all intents and purposes, as a part of this Constitution when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress: Provided, That no amendment, which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the Ninth Section of the first Article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

Eighteen amendments have been made to the Constitution since its adoption—a period of one hundred and thirty-one years—another, the one at bar, has been proposed and is now pending—all originating in the Congress by resolution, adopted by a two-thirds vote of both branches, House and Senate, submitted to the "Legislatures of the several States," and ratified by the "Legislatures of three-fourths of the several States."

The Amendment at bar—the Suffrage Amendment—is in process of adoption by the same procedure.

In every instance the States have acted by and through their Legislatures or General Assemblies—bodies composed of members elected by, and representative of, the people, and usually, though not exclusively, by joint resolutions passed by each House of the several Assemblies and certified without executive signature or approval. This has been the procedure and form for one hundred and thirty-one years during which there have been established eighteen precedents without an exception or a break in the line. No attempt at Amendment has ever been made in any other or different form or manner, either the amendment at bar and the one immediately preceding it—the Eighteenth, or Prohibition Amendment, and then only by a few states where it is claimed the act of ratification is not complete with the action of the General Assembly until its act of approval is confirmed by referendum election by the state's qualified electors.

Among the States challenging the right of the Legislature to ratify in conformity with the provisions of Article V of the Constitution and with the precedents of a century and a third, is the State of Ohio, where by an amendment to the State Constitution adopted in November, 1918, it provided:

> Be it resolved by the people of the State of Ohio: The people also reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States.
>
> No such ratification shall go into effect until ninety days after it shall have been adopted by the General Assembly. When a petition signed by six percentum of the electors of the State, as is provided by a referendum petition on laws

passed by the General Assembly, shall have been filed with the Secretary of State within ninety days after said ratification of the General Assembly, ordering that such ratification be submitted to the electors of the states for their approval or rejection, in the manner provided for the submission by referendum of a law passed by the General Assembly, and said action of the General Assembly ratifying the said amendment to the Constitution of the United States shall not go into effect until and unless approved by a majority of those voting upon the same. All the provisions of the Article on the subject of the referendum upon laws passed by the General Assembly shall apply thereto, as far as the same are applicable, except that the General Assembly may not declare its ratification of a proposed amendment to the Constitution of the United States an emergency and not subject to the referendum.

Here, we submit, is an attempt by a State and its people to reserve to itself a power which they do not possess. Upon admission into the Union, the State of Ohio and its people parted with their legal sovereignty in the matter of making amendments to the Federal Constitution and shifted that sovereignty to the people of the United States, or, as has been said more exactly, to "the States' Government as forming one aggregate body represented by three-fourths of the several States at any time belonging to the Union."

As suggested in the Harvard Law Review for December, 1919, hereinbefore cited, "Article V itself accomplished this shift of sovereign power, and by its provisions the Constitution may be amended in spite of the unanimous vote of the people of any one state, and an amendment proposed by the unanimous vote of the people in one state can not become 'The Supreme Law' of that state un-

less it be approved by sufficient sister states to total three-fourths of the then existing states."

But notwithstanding this fact, the people of Ohio, by the referendum provision in their Constitution, are attempting to reserve to themselves the power to arrest and set aside the process of ratification provided by the Constitution—a power with which they parted the day they entered the Union and do not now possess—not having it, they can not reserve it.

It is an instance where a State in its Constitution declares that no ratification by the General Assembly "shall go into effect until ninety days after it shall have been adopted by the General Assembly" while the Constitution of the United States declares that ratification shall be effective, so far as Ohio is concerned, the moment affirmative action by the Legislature is taken and that the moment three-fourths of the Legislatures of the several States have taken like action the Amendment "shall be valid, to all intents and purposes," that is, shall be effective, so effectually effective that the State, neither through the action of its legislature nor otherwise, can recall its act.

They are suspending the act of ratification of their State Legislature not only for ninety days, but where a referendum petition is filed within ninety days, "until and unless" such act of ratification is "approved by a maority of those voting" in the referendum election, whereas the Constitution of the United States makes ratification effective, "to all intents and purposes," upon ratification "by the Legislatures of three-fourths of the several States."

If, in the present instance, the Legislature of Ohio were the thirty-sixth Legislature ratifying the amendment at bar, the Constitution of the United States and the laws

enacted by the Congress of the United States in the exercise of a power unquestionably lodged in it would declare the amendment "ratified to all intents and purposes," but the referendum clause in the Ohio Constitution would suspend ratification not only in Ohio, but throughout the Union, for a period of ninety days, notwithstanding the National Constitution and the laws of Congress. A small per cent. of the people of Ohio—six per cent.—by the filing of a petition with the Secretary of State for a referendum election on the action of ratification by the State Legislature would suspend ratification and the taking effect of the amendment "until and unless" such act of ratification was "approved by a majority of those (the electors of Ohio) voting in the referendum election."

The letter and the spirit of the Constitution and the precedents of a century and a third are against the attempt, but that they may be justified and bring their act within the grant of ratifying power expressed in Article V of the Constitution, they insist upon a strained and forced construction of the letter of that great Instrument, claiming for the word "Legislature" as used therein, a meaning utterly foreign to the context, to the unbroken legislative and executive precedents of interpretation and to the mind and thought of the men who formulated the Constitution and the Convention that adopted it. They interpret the word to mean "the law-making power" of each state, amending, by interpretation, the Constitutional letter to read, "when ratified by the law-making power of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress." The interpellation of the words the "law-making power" instead of the

Legislatures, of three-fourths of the States in the context of the Constitutional provision, discloses of itself such an incongruity as to preclude its acceptance. It convicts the framers of the Constitution of delegating the power of ratification in one instance, not to an entity of well-defined character—a body composed of delegates or members—but to a vote of the proletariat, and in the next instance, and in the same sentence, of delegating such power of ratification to a convention composed of delegates or members—a convention without any legislative power whatever. Such inconsistency and diversions of thought and purpose cannot, we think, be justly imputed to minds like those who framed and adopted this great National pact.

In this clause in the Ohio constitution, the power to ratify amendments, granted directly by the National Constitution, is to be taken away from the Legislature, or at least made subject to revocation by a plebiscite. If permitted, it will amount to a nullification of the provisions of the Constitution and destroy its integrity. It is unthinkable that a single state may reserve power delegated by the whole people to the Federal Government when the Constitution was formed. Neither the people of the State nor those of the Nation have ever had the right to participate directly in the matter of ratification of a Federal Constitutional Amendment. It is important in this behalf to remember that the authority to ratify, redelegated by the National Government, is not bestowed upon the State or upon the people of the State, but upon the Legislature—a known and recognized agency or entity. Justices Parker and Mitchell, in the dissenting opinion in the Oregon case, *State v. Howell, supra*, put it well:

> It is therefore plain that the above-quoted portion of the Fifth Article of the Federal Constitu-

> tion is the supreme law of the land, touching the subject of amending that instrument. The several States, by the expressed provisions of that Article, have as completely surrendered the power to prescribe a different manner of amending the Federal Constitution as they have surrendered to the Federal Government the sovereign powers enumerated in that instrument to be exercised by the Federal Government * * *.
>
> I am convinced that the ratification by the State Legislature of a proposed amendment to the Federal Constitution is an exercise of a power which the Legislature possesses by virtue of the Fifth Article of that instrument, and that designation by Congress of the method of ratification in pursuance of the power given to Congress by that Article, and that the Legislature is not acting in pursuance of that power given it by the State Constitution, except in so far as the Legislature may owe its existence to the State Constitution.

In Jameson, Constitutional Conventions (4th Ed.), Sec. 583, it is said:

> The power of a state legislature to participate in amending the Federal Constitution exists only by virtue of a special grant in that constitution. It is a power it could not assume under any notion of a general right to legislate, for that right is confined to state limits, and to the enactment of ordinary laws.

The Supreme Court of Maine, in an advisory opinion handed down at the request of the Governor, in *In re Opinion of Justices*, 107 Atl., 673, declares:

> The people through their constitution might have clothed the senate alone, or the house alone, or the governor's council or the governor with the power of ratification, or might have reserved that power to themselves to be exercised by popular vote. But they did not. They retained no power of ratification in themselves but conferred it completely upon the two houses of the legislature, that is the legislative assembly. * * *

> It admits of no doubt that in the matter of amendment, which is governed by Article V, the people divested themselves of all authority and conferred the power of proposal upon Congress or upon a national constitutional convention, and the power of ratification upon the state legislature or upon state constitutional conventions.

In volume 2, p. 1310, of Watson's Constitutional Law, it is said:

> Whether an amendment is proposed by Congress **or by a convention**, it is ratified or rejected by the representatives of the people either in the legislature, or in convention, and not by the people voting on it directly. The people have no direct power either to propose an amendment or to ratify it after it is proposed and submitted.

The Maine court held in the opinion cited above that the people of the State of Maine had completely and unreservedly lodged their power over amendments with the bodies designated in Article V, and had no power left in themselves either to propose or to ratify federal amendments, declaring, "the authority is elsewhere."

The weight of authority in behalf of the contention we make is overwhelming; indeed, with the exception of the Washington case, *State v. Howell*, *supra*, there are no other or adverse precedents.

2. The history of Article V, and the use and understanding of the word "Legislature" at the time of the formulation and adoption of the Federal Constitution, utterly preclude the "legislative power" interpretation or theory.

The history of the times, of Article V, and of the Constitution Convention and its debates, and those of the state conventions called to ratify the Constitution, and the

general understanding of the meaning of the word "legislature" and the use that was then made of it, conclusively show that by the use of the word in Article V the framers of the Constitution intended to delegate the power of ratification of amendments to the general assemblies of the respective states—their representative law-making bodies composed of delegates or members elected by the people.

Immediately after the Declaration of Independence, the Continental Congress passed a resolution recommending that each of the thirteen states adopt a state constitution suitable to its own needs. In pursuance of that resolution the state of Virginia adopted a state constitution, early in 1776, in which it was declared:

> We ordain and declare the future form of government to be as follows: The legislative, the executive, and the judiciary departments shall be separate and distinct. The legislature shall be formed of two distinct branches, which together shall be a complete legislature.

In that there was no room for the referendum, or for the "legislative power" theory of a legislature plus the body of the electors.

The next year a constitutional convention sat in New York and framed a constitution, written by John Jay, the first Chief Justice of this high Court, and the foremost lawyer of his time, in which it was provided:

> This convention, in the name and by the authority of the good people of this State, ordain and determine and declare, that the supreme legislative power within this State shall be vested in two separate and distinct bodies of men who together shall form the Legislature.

During the Revolutionary period every other of the thirteen states, except two—Rhode Island and Connecticut—

formulated and adopted similar state Constitutions, and the two that did not do so, did not, only because they already had similar bodies under their charters.

Because of these years of debate and constitution making, the word legislature had come to have a fixed and definite meaning among statesmen and public men and by the public itself. It meant an assembly of two houses whose members were elected by the people and were their delegates or representatives. It meant that, and only that. There was no thought of a legislature constituted of an assembly plus the people.

If there had been no debates in the Constitutional Convention or in the conventions called to ratify the Constitution, on the subject at all, the meaning of the word in the minds of the framers of the Constitution and their understanding of the entity they were designating in Article V, as the ratifying agency of the several states, would have been convincingly apparent. But there were debates both in the Constitutional convention and in the ratifying conventions, and these debates make the matter conclusively clear. There is no ambiguity, uncertainty or doubt.

Take first the history of Article V in its progress through the Convention from its first introduction until it finally found its place in the Constitution in its completed form.

It first appeared in the resolutions offered by Edmund Randolph, May 29, 1787, and read as follows:

> 12. Resolved, That provision ought to be made for the amendment of the articles of Union, whensoever it shall seem necessary; and that assent of the national legislature ought not to be required thereto.
>
> Elliott's Journal, 145.

On June 19th, the Committee of the whole house re-

ported the Randolph resolutions as altered, amended and agreed to in the committee, with the following provision as to amendment:

> 17. Resolved, That provision ought to be made for the amendment of the articles of union whensoever it shall seem necessary.
>
> Elliott's Journal, 182.

On May 29th, Charles Pinckney presented a draft of a federal government, the Sixteenth Article of which provided:

> If two-thirds of the legislatures of the states apply for the same, the legislature of the United States shall call a convention for the purpose of amending the constitution. Or should Congress, with the consent of two-thirds of each house, propose to the states amendments to the same, the agreement of two-thirds of the legislatures of the states shall be sufficient to make the said amendments parts of the constitution.
>
> Elliott's Journal, 149.

On July 26th, the resolutions of the convention were referred to a committee of detail composed of Messrs. Rutledge, Randolph, Gorham, Ellsworth and Wilson, for the purpose of reporting a constitution, the Nineteenth Article of which reads:

> Resolved, That provision ought to be made for the amendment of the articles of union whensoever it shall seem necessary.
>
> Elliott's Journal, 223.

On August 6th, the Committee of Detail reported a draft of the constitution, the Nineteenth Article of which provided:

> On the application of the legislatures of two-thirds of the states in the Union for an amendment of this Constitution, the legislature of the United States shall call a convention for that purpose.
>
> Elliott's Journal, 230.

Subsequently, a Committee of Revision was appointed and the tentative draft was referred to it. On September 12th, the Committee reported a revised draft in which appeared the following:

> Art. V. The Congress, whenever two-thirds of both houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid, to all intents and purposes, as part thereof, when the same shall have been ratified by three-fourths, at least, of the legislatures of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the —— and —— sections of article ——.
>
> Elliott's Journal, 304.

On September 15th, Art. V was amended and given its present form, to-wit:

> The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: **Provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the 1st and 4th clauses in the 9th section of the 1st article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.**
>
> Elliott's Journal, 317.

Immediately thereafter, the question to agree to the Constitution as amended was put and carried in the affirmative, all the States concurring, and the instrument was engrossed.

This history of the evolution of the amendatory clause, is of itself convincing evidence that those who formulated it had in mind the designation of a ratifying agency in each of the several states definite and well understood—a state assembly or representative body, to be, as Congress might determine, the legislature or law-making body of the state, according to the meaning of the word "legislature" as then understood and accepted, or a special delegated body to be known as a convention.

Take next the debates in the conventions, national and state:

The national Convention met on May 14th, 1787. On May 29, as we have already seen, Edmund Randolph, a delegate from Virginia and the Governor of that state, laid before the Convention certain resolutions, one of which, the fifteenth, was as follows:

> That the amendments which shall be offered to the confederation by the convention ought at the proper time, or times, after the approbation of congress, to be submitted to an assembly or assemblies of representatives, to be expressly chosen by the people to consider and decide thereon.

The resolution proposed by Mr. Randolph, was considered by the convention on June 5. (Madison's Journal 111, 112.):

> Mr. Sherman thought such a popular ratification unnecessary; the articles of confederation providing for changes and alterations, with the assent of congress, and ratification of state legislatures.
>
> Mr. King, supposed that the last articles of confederation rendered the legislature competent to

> the ratification. The people of the Southern states, where the Federal articles had been ratified by the legislatures only, had since, impliedly given their sanction to it. He thought, notwithstanding, that there might be policy in varying the mode, a convention being a single house, the adoption may more easily be carried through it, than through the legislatures, where there are several branches. The legislatures, also, being to lose power, will be most likely to raise objections. *The people having already parted with the necessary powers*, it is immaterial to them by which government they are possessed provided they be well employed. (Italics ours.)

Again, on June 20, Mr. Ellsworth of Connecticut observed (Madison's Journal, 199-200):

> He wished also, the plan of the convention to go forth as an amendment of the articles of the confederation, since under this idea the authority of the legislatures could ratify it. If they were unwilling, the people will be so too. If the plan goes forth to the people for ratification, several succeeding conventions within the states would be unavoidable. He did not like these conventions that were better fitted to pull down than to build up constitutions.
>
> Mr. Randolph did not object to the change of expression, but apprised the gentlemen who wished for it, that he did not admit it for the reasons assigned; particularly that of getting rid of reference to the people for ratifications.

Apparently, Mr. Ellsworth was not yet satisfied with the idea of ratifying the new constitution by convention, for upon June 23rd he moved that it be referred to the legislatures of the states for ratification.

We quote from Mr. Madison's Journal again (pp. 410-416):

> Colonel Mason considered a reference of the plan to the authority of the people, as one of the

most important and essential of the resolutions. *The legislatures have no power to ratify it. They are the mere creatures of the state constitutions*, and cannot be greater than their creators. And he knew of no power in any of the constitutions —he knew there was no power in some of them —that could be competent to this object. Whither, then, must we resort? To the people with whom all power remains that has not been given up in the constitutions derived from them. It was of great moment, he observed, that this doctrine should be cherished, as the basis of free government. Another strong reason was, that *admitting the legislatures to have a competent authority, it would be wrong to refer the plan to them, because succeeding legislatures, having equal authority, could undo the acts* of their predecessors; and the National government would stand in each state on the weak and tottering foundation of an act of assembly. There was a remaining consideration, of some weight. In some of the states the governments were not derived from the clear and undisputed authority of the people. This was the case in Virginia. Some of the best and wisest citizens considered the constitution as established by an assumed authority. A National constitution derived from such a source would be exposed to the severest criticisms." (Italics ours.)

Mr. Randolph. One idea has pervaded all our proceedings, to-wit, that opposition as well from the states as from individuals, will be made to the system to be proposed. Will it not then be highly imprudent to furnish any unnecessary pretext, by the mode of ratifying it? Added to other objections against a ratification by the legislative authority only, it may be remarked, that there have been instances in which the authority of the common law has been set up in particular states against that of the confederation, which has had no higher sanction than legislative ratification. Whose opposition will be most likely to be excited against the sytem? That of the local demagogues

who will be degraded by it, from the importance they now hold. These will spare no efforts to impede that progress in the popular mind, which will be necessary to the adoption of the plan and which every member will find to have taken place in his own, if he will compare his own, if he will compare his present opinions with those he brought with him into the convention. It is of great importance, therefore, that the consideration of this subject should be transferred from the legislatures, where this class of men have their full influence, to a field in which their efforts can be less mischievous. It is, moreover, worthy of consideration, that some of the states are averse to any change in their constitution, and will not take the requisite steps, unless expressly called upon, to refer the question to the people.

Mr. Gerry. The arguments of Col. Mason and Mr. Randolph prove too much. They prove an unconstitutionality in the present Federal system, and even in some of the state governments. * * * Both the State government and the Federal government have been too long acquiesced in to be now shaken. He considered the federation to be paramount to any state constitution. The last article of it, authorizing alterations, must consequently be so as well as the others; and everything done in pursuance of the article, must have the same high authority with the article. Great confusion, he was confident, would result from a recurrence to the people. They would never agree on anything. He could not see any ground to suppose that the people will do what their rulers will not. The rulers will either conform to, or influence the sense of, the people.

Mr. Gorman was against referring the plan to the legislatures. 1. Men chosen by the people for the particular purpose will discuss the subject more candidly than members of the legislature who are to lose power which is to be given up to the general government. 2. Some of the legislatures are composed of several branches. It will be

more difficult in these cases to get the plan through the legislatures, than through a convention. 3. In the states many of the ablest men are excluded from the legislature, but may be elected to a convention. 4. The legislatures will be interrupted with a variety of little business; by artfully pressing which, designing men will find means to delay from year to year, if not to frustrate altogether, the national system. 5. If the last article of the confederation is to be pursued, the unanimous concurrence of the states will be necessary. * * * It would, therefore, deserve serious consideration, whether provision ought not to be made for giving effect to the system, without waiting for the unanimous concurrence of the states.

Mr. Ellsworth. If there be only legislatures who should find themselves incompetent to the ratification, he should be content to let them advise with their constituents and pursue such a mode as would be competent. He thought more was to be expected from the legislatures, than from the people. * * * It was said by Colonel Mason—in the first place, that the legislatures have no authority in this case; and in the second, that their successors, having equal authority, could rescind their acts. As to the second point he could not admit it to be well founded. *An act to which the states by their legislatures made themselves parties becomes a compact from which no one of the parties can recede of itself.* As to the first point, he observed that a new set of ideas seemed to have crept in since the articles of confederation were established. Conventions of the people or with power derived from the people were not then thought of. The legislatures were considered as competent. Their ratification has been acquiesced in without complaint. *To whom have Congress applied on subsequent occasions for further powers? To the legsilatures, not to the people.* The fact is, that we exist at present (and we need not inquire how) as a Federal society united by a charter, one article of which is that alterations therein may be made by the legis

lative authority of the states. It has been said that if the confederation is to be observed, the states must unanimously concur in the proposed innovations. He would answer, that if such were the urgency and necessity of our situation as to warrant a new compact among a part of the states, founded on the consent of the people; the same pleas would be equally valid, in favor of a partial compact, founded on the consent of the legislatures. (Italics ours.)

Mr. Williamson thought the resolution (the nineteenth) so expressed, as that it might be submitted either to the legislatures or to conventions recommended by the legislatures. He observed that some legislatures were evidently authorized to ratify the system. He thought, too, that conventions were to be preferred, as more likely to be composed of the ablest men in the states.

Mr. Gouverneur Morris considered the inference of Mr. Ellsworth from the plea of necessity, as applied to the establishment of a new system, on the consent of the people of a part of the states, in favor of a like establishment, on the consent of a part of the legislatures, as a *non-sequitur*. If the confederation is to be pursued, no alteration can be made without the unanimous consent of the legislatures. Legislative alterations not conformable to the Federal compact would clearly not be valid. The judges would consider them as null and void. Whereas, in case of an appeal to the people of the United States, the supreme authority, the Federal compact may be altered by a majority of them, in like manner as the constitution of a particular state may be altered by a majority of the people of the state. The amendment moved by Mr. Ellsworth erroneously supposed that we are proceeding on the basis of the confederation. This convention is unknown to the confederation.

Mr. King thought with Mr. Ellsworth that the legislatures had competent authority, the acquiescence of the people of America in the confederation being equivalent to a formal ratification by

the people. He thought with Mr. Ellsworth, also that the plea of necessity was as valid in this case as the other. At the same time, he preferred a reference to the authority of the people expressly delegated to conventions, as the most certain means of obviating all disputes and doubts concerning the legitimacy of the new constitution, as well as the most likely means of drawing forth the best men in the states to decide on it. He remarked that among other objections made in the state of New York in granting powers to Congress, one had been that such powers as would operate within the states could not be reconciled to the constitution, and therefore were not grantable by the legislative authority. He considered it as of some consequence, also, to get rid of the scruples which some members of the state legislatures might derive from their oaths to support and maintain the existing constitutions.

Mr. Madison thought it clear that the legislatures were incompetent to the proposed changes. These changes would make essential inroads in the state constitutions; and it would be novel and dangerous doctrine that a legislature could change the constitution under which it held its existence. There might indeed be some constitutions within the Union which had given a power to the legislature to concur in alterations of the Federal compact. But there were certainly some which had not; and in the case of these, a ratification must of necessity be obtained from the people. He considered the difference between a system founded on the legislatures only, and one founded on the people to be the true difference between a league or treaty, and a constitution. The former, in point of moral obligation, might be as inviolable as the latter. In point of political operation, there were two important distinctions in favor of the latter. First a law violating a treaty ratified by pre-existing law might be respected by the judges as a law though an unwise or perfidious one. A law violating a constitution established by the people them-

selves, would be considered by the judge as null and void. Secondly, the doctrine laid down by the law of nations in the case of treaties is, that a breach of any one article by any of the parties frees the other parties from their engagements. In the case of a union of people under one constitation, the nature of the pact has always been understood to exclude such an interpretation. Comparing the two modes, in point of expediency, he thought all the considerations which recommended this convention, in preference to congress, for proposing the reform, *were in favor of state conventions, in preference to the legislatures*, for examining and adopting it. (Italics ours.)

And against, upon August 31, we find that Mr. L. Martin insisted *on a reference to the state legislatures. He urged the danger of commotions from a resort to the people and to first principles* in which a government might be on one side, and the people on the other. He was apprehensive of no such consequences, however, in Maryland, whether the legislature or the people should be appealed to. Both of them would be generally against the constitution. Madison's Journal, p. 542. (Italics ours.)

Mr. Stillman, a delegate in the Massachusetts convention, in a general review of the constitution said:

> All the offices in Congress are elective, not hereditary. The President and senators are to be chosen by the interposition of the legislatures of the several states, who are the representatives and guardians of the people, who see honor and interest will aid them in all probability to have good men placed in the general government.
>
> Elliott's Debates, Vol. 2, p. 166.

In the New York Convention, Mr. Smith said:

> With respect to the second part of the amendment, I would observe, that, as the senators are the representatives of the state legislatures, it is reasonable and proper that they should be under their control.
>
> Elliott's Debates, Vol. 2, p. 311.

In the same Convention, Mr Hamilton made this utterance:

> Sir, the most powerful obstacle to the members of Congress betraying the interest of their constituents, is the state legislatures themselves, who will be standing bodies of observation, possessing the confidence of the people, jealous of federal encroachments, and armed with every power to check the first essay of treachery.

Elliott's Debates, Vol. 2, p. 266.

Mr. Dana in the Massachusetts Convention said:

> If they were recommended to be adopted by this Convention, it was very probable that two-thirds of the Congress would concur in proposing them; or that two-thirds of the legislatures of the several states would apply for the call of a convention to consider them, agreeably to the mode pointed out in the Constitution.

Elliott's Debates, Vol. 2, p. 138.

Mr. Iredell in the North Carolina Convention made clear his concept of what was meant by the term "legislatures":

> By referring this business to the legislatures, expense would be saved, and in general, it may be presumed they would speak the genuine sense of the people. It may, however, on some occasions be better to consult an immediate delegation for that special purpose. This is, therefore, left discretionary. It is highly probable that amendments agreed to in either of these methods would be conducive to the public welfare, when so large a majority of the states consented to them.

Elliott's Debates, Vol. 4, p. 177.

In the Virginia Convention, Patrick Henry was equally clear as to his understanding of what was meant by the word "Legislature":

> Two-thirds of the Congress, or of the state leg-

islatures, are necessary even to propose amendments. If one-third of these be unworthy men, they may prevent the application for amendments; but what is destructive and mischievous, is, that three-fourths of the state legislatures, or of the state conventions, must concur in the amendments when proposed. In such numerous bodies, there must necessarily be some designing, bad men. To suppose that so large a number as three-fourths of the states will concur, is to suppose that they will possess genius, intelligence, and integrity, approaching to miraculous.

Elliott's Debates, Vol. 3, p. 49.

Throughout the sittings of the Conventions, the resolutions offered and considered, and the debates upon them, whether in their first or final forms, the word "legislature" was used with like meaning whether applied to state assembly or the National Congress, distinguished only by the use of "state" or "national" before the word, as the object desired to be expressed required. Both state legislatures, with one or two exceptions and these not greatly variant, and the National Legislature, were, in the thought of these men, representative law-making bodies.

These papers and these debates, whether in the Constitutional Convention itself or in the state ratifying conventions, lead the mind irresistibly to that concept and interpretation of the term. If that was the understanding of the word by those who framed the Constitution and those who adopted it, and they so used it, then that it what it now means. We must continue to give it the meaning its framers and ratifiers intended it should have. What it meant to them, it must continue to mean to us.

Dred Scott Case, 19th R. 393.

3. Long and unvaried construction of the word "Legislatures" used in Article V, by the executive and legislative departments of the government, have conclusively established the meaning of the term.

Executive and legislative construction covering a century and a third of history, has conclusively established the meaning of the word "Legislatures" in Article V of the Constitution to be the general assemblies of the several states—their law-making bodies composed of representatives elected by the people—and exclude the "legislative power" interpretation.

Such construction, long continued and unvaried and acquiesced in, by other departments of the government, public officials and the people, if not absolutely binding upon this Court, is entitled to grave consideration and should be given great weight when the Court is called upon to examine and declare the meaning of the instrument or clause involved.

Willoughby on the Constitution, p. 20, sec. 20.

The term legislature, in either its singular or plural form, appears thirteen times and in ten different connections in the constitution with reference to state legislatures.

Article 1, Section 2, paragraph 1; Section 3, paragraph 1; Section 4, paragraph 1; Section 8, paragraph 17.

Article 2, section 1, paragraph 2.

Article 4, section 3, paragraph 1; section 4 (twice).

Article 5 (twice).

Article 6, paragraph 3.

Amendments 14, paragraph 2; 16, 17, paragraph 1, 2 (twice).

It cannot be claimed that the word is used in all these ten connections in the same sense; there are instances

in which it is perhaps used with the "legislative power" meaning contended for by the referendum advocates, as in section 4, Article 1, which reads:

> The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof.

We do not concede that it is so used in the clause just quoted, but granting it is, it does but accentuate the certainty that it is not so used in Article 5.

The grant of the power in section 4, of the first Article is a legislative grant giving to the law-making power of a state full authority to prescribe by a law, duly enacted, the times, places and manner of holding elections for senators and representatives.

The majority opinion in the Washington case, *State v. Howell, supra*, is founded in argument and in authority upon that contention and based upon *State ex rel. Schrader v. Polley*, 26 S. D. 5, and *State ex rel Davis v. Hildebrant*, 94 Ohio St. 154, and *State ex rel. Davis v. Hildebrant*, 241 U. S. 565.

Granting for the purpose of the present argument that the interpretation given the use of the word in Article 1 by the Dakota and Ohio courts and by this Court is correct, the cases are easily distinguishable from the case at bar and the meaning of the word "Legislatures," as used in the fifth Article.

The distinction is made with clearness and accuracy by Judges Parker and Mitchell in their dissenting opinion in the Howell case:

> The question in each of those cases was as to whether or not an act passed by the representative legislative law-making body of the state, called "legislature" in South Dakota and "general assembly" in Ohio, dividing the state into congressional districts, and providing for the election of

representatives in congress therefrom, was subject to a referendum vote of the people of the state under the initiative and referendum provision of its constitution; those courts deciding that such an act was subject to a referendum vote of the people. It seems to me at once apparent that there is a marked distinction between the legislative power reserved to the several states by the provisions of section 4, article 1, of the federal constitution, and the provisions of article 5 of that instrument, providing the manner in which the respective states and the people shall express their ratification of proposed amendments to that instrument. The former is the enactment of law, the prescribing of a rule of conduct by the sovereign legislative power of the state, subject, of course, to be superseded by laws which may be enacted by congress, but nevertheless within itself an act of legislation, completed or to be completed by the sole legislative power of the state; and the fact that such legislation may have to give way to some higher law which congress may enact, does not in the least change the fact that it is an act done by the legislative power of the state, in the doing of which no other state or power has any voice whatever. The latter is but the casting of the vote of the state and its people upon the question of amending the federal constitution, in the manner provided for by the terms of that instrument; a question not of state legislation, but of national legislation, in which each state has but one vote. I think that the South Dakota and Ohio decisions are of no controlling force in the solution of this problem.

In section 1, of Article 2, we have the following:

> Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors.

Can it be held with any degree of fairness of interpretation that a referendum could be held by a state upon the manner of appointing presidential electors?

Is it not clear that the framers of the constitution intended that the term "legislature" in this instance should mean a representative body of men who make the laws of the state?

Section 3 of article 1 of the constitution provides:

> The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

Can it be contended that the framers of this section had in mind, when they provided for the election of United States senators by the "legislatures" of the several states, the "legislative power" of the states? Is it not clear that the intention was to designate a representative or delegated body?

The latter meaning and intention were so obvious that no one contended or even believed a United States senator could be elected by any other body than the state legislature, or that its power to elect could be impaired by the state or shared with the people through a plebiscite—so obvious, indeed, that the congress by more than a two-thirds vote proposed and submitted an amendment to the Constitution, to the legislatures of the several states for their ratification, divesting legislatures of their power to elect senators and vesting it in the people of the respective states.

This we submit is a high legislative interpretation of the meaning of the word as it appears in the third section of Article 1, where the connection in which it is used is identical with that in which it is used in Article 5.

Here is another congressional interpretation, which, we think, has value in this connection.

In 1887, the State of West Virginia had a constitutional

provision prohibiting the legislature from transacting, or entering upon, any business when in special session other than that set out in the proclamation of the Governor convening it.

There was a vacancy in the State's representation in the Senate of the United States.

The Governor waited to submit notice of the vacancy, until the legislature adjourned, and then appointed Mr. Daniel B. Lucas to fill the vacancy. Later he convened the legislature in special session, limiting in his proclamation the business of the session to eight distinct propositions enumerated therein. The election of a United States Senator was not mentioned in the proclamation. When the legislature convened in special session, it proceeded to elect Charles J. Faulkner to fill the vacancy in the Senate. A contest arose in the Senate of the United States as to which of the two men—Mr. Daniel B. Lucas, the Governor's appointee, or Mr. Charles J. Faulkner, the choice of the legislature—should be seated.

The Senate was then Republican and a majority of the committee on Privileges and Elections was composed of Republicans. On this committee were many distinguished Senators and some of them eminent lawyers—Hoar of Massachusetts, Fry of Maine, Teller of Colorado, Evarts of New York, Spooner of Wisconsin, Saulsbury of Delaware, Vance of North Carolina, Pugh of Alabama, and Ustes of Louisiana.

The committee reported, seating Mr. Faulkner and excluding Mr. Lucas. The action of the committee was affirmed by the Senate. In its report, the committee said:

> The Constitution of the United States is the supreme authority, and all provisions of the constitution or statutes of any state are void and of

no effect unless they can be so construed as not to conflict with its provisions. * * *

But it seems to the committee that the construction of the State Constitution of West Virginia, upon which the above argument is based, is one which will not bear examination. When that constitution provided that the legislature so convened in extraordinary occasions should enter upon no business except that stated in the proclamation by which it was called together, the people must be presumed to have had in mind business to be transacted under authority of the State Constitution, and not to have intended to prohibit the performance of duties imposed upon it by the supreme authority of the Constitution of the United States. * * *

But we are of the opinion that no state can prescribe any qualification to the office of United States senator in addition to those declared in the Constitution of the United States.

Here again, we have a clear case of legislative interpretation in accord with our contention of the meaning of the word "legislature" as used in the Fifth Article and opposed to the "legislative power" contention.

In Section Three of Art. IV, there is a provision that no state shall be "formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress."

Can it be contended that a state, by any individual action of its own, could impair the power of the legislatures of two consolidating states and the Congress of the United States to consent to a consolidation by providing that the consent of the legislatures, or of either of them, to such consolidation should be invalid until submitted to a plebiscite?

And is not the connection and meaning of the word

"legislatures" as used in this Article, identical with the connection and meaning of the word as used in Art. V? The thing required of the legislature in each article, is consent and not legislation.

In Section Four of Art. IV of the Constitution, it is provided:

> The United States shall guarantee to every state in the Union, a republican form of government, and shall protect each of them against invasion and, on application of the Legislature, or of the executive (when the Legislature cannot be convened), against domestic violence.

Can it be contended that a state, by adding a referendum clause to its constitution, could forbid the application of the legislature, or, if the legislature could not be convened, the application of the governer, to the United States for protection against domestic violence until a plebiscite could be held and such action authorized?

Was any thought like that in the minds of the men who framed this section? And, is not the word used in similar connection and with like meaning in Art. V as it is used in this section of the Fourth Article?

Does it not come with such cogency as to coerce conviction, considered in the light of history; precedent; interpretation, legislative and executive, and the context and connection in which the word "legislatures" is used in Art. V, that it was the intention of the fathers who formed, fashioned and adopted Art. V, to invest the complete power as to ratifying an amendment to the Constitution, in the legislature as a representative body and not in the intangible something called "legislative power"? and to so vest it to the exclusion of any direct participation by the people, except through the election of members of the legislature?

We know it is argued:

> That here, of all places, should the people be accurately heard when a change in their constitution is involved; that to interpret narrowly the word "Legislature" in Art. V will create a danger of unseemly conflicts between outside, direct expressions of popular will, and the official expression conveyed through the people's representatives; and that in interpreting a constitution, presumption should always favor whatever construction will best effect the end of all governments—the orderly welfare of their people.

But is that argument to outbalance the weight of the letter itself? the intention of the framers of the Constitution? and of the conventions that have adopted it? and the weight of one hundred and thirty-one years of unbroken precedent?

Is it not inconceivable that the power of determining the validity of ratification was meant to be vested in any one state, or anywhere but "in the Government of the United States"? The question goes, it seems to us, to the very heart of the National pact. Its life is dependent upon the answer, not immediately, perhaps, but eventually. It was well said by a citizen of my state, now dead, and formerly President of the United States, that the length of a step is not of so much concern as the direction of the step.

Interpretation of the Constitution is a judicial function. The Courts, however, may not make a new constitution. They may interpret the one that is. But even here, they may not be a "law unto themselves." There are rules of construction which bind them and which they must follow—even this high Court—rules made and established by you and your great predecessors for the court's guidance, and which we need but to suggest to have considered and followed.

The construction given must be a reasonable construc-

tion. Every clause must have a reasonable interpretation and held to express the intentions of the framers.

Woodson v. Murdock, 72 Wall. 351.

The Federal Constitution, like every other grant, is to have a reasonable construction according to the import of its terms.

Martin v. Hunter, 1st Wheat. 304, 326;
Pollock v. Farmers, 158 United States 601, 618, 619.

The Constitution and laws of the United States are construed as all other instruments granting power or property.

Rhode Island v. Mass., 12 Pet. 657, 723;
Brown v. Maryland, 12 Wheat. 419, 437;
U. S. v. Arredonds, 6 Pet. 691, 738, 740.

In the construction of the Constitution, the words, the subjects, the context, and the intentions of the persons using them are all to be taken into view.

U. S. v. Arredonds, 6 Pet. 691, 738, 740;
Rhode Island v. Mass., 12 Pet. 657, 721, 723;
Pollock v. Farmers, 158 United States, 691 618, 619.

These rules applied to the case at bar lead our minds with irresistible force to the conclusion that the term "legislatures" as used in Article V of the Constitution, vests the power to ratify an amendment to the Constitution in the general assemblies of the respective states and not in whatever "law making power" the vagaries of the various states may lead them to establish.

4. Ratification of an Amendment to the Constitution Is Not a Legislative Act. It Is Not a Law-making Function.

The Supreme Court of Ohio in the case at bar, and the Supreme Court of Washington in *State v. Howell*, *supra*,

each by a divided opinion, held the ratification of an amendment to be a law-making function. It seems clear to us, on reason, that it is not, and the great weight of authority holds that it is not. The act lacks the essential elements of law-making. As we have elsewhere pointed out in this brief, the power to ratify is not derived from the state at all, but from the Federal government through the national constitution. The legislature, therefore, takes the power into its absolute possession, unlimited, unaffected and indivisible by anything the state or its people may do. This fact alone strips it of every characteristic of state legislative action or power.

Ratification does not require the enactment of a law, the passage of a concurrent, or even a joint, resolution of the legislature; it could be done by a simple motion in each House and the action certified to the Secretary of State at Washington. It does not require the signature of the Governor; it does not even have to be submitted to him.

If it were a state legislative act, it would require submission to the Governor and his signature, either in approval, or in disapproval through a veto, in every state in the Union. If it required the exercise of the law-making power of a state, it would require the Governor's participation, for through his right to recommend legislation and to approve the same when enacted, and his power to veto it if he disapprove, the Governor is a very substantial element of the law-making power.

We are aware of the argument in the opinion of both the Ohio and the Washington courts that ratification is a high legislative function, but the argument is not con-

vincing. Ratification by a state enacts no law in and of itself; it but registers the state's assent through its legislature as the agency selected by the government of the United States for that purpose, to a proposal made by the Congress for an amendment to the Constitution. It is simply the state's "aye" uttered through its legislature when its name is called. It could quite as well be uttered by the Governor had he been designated by the Constitution as the ratifying agent, or by the Secretary of State, so far as legality is concerned.

Ratification is but one of the three steps in the making of an amendment now required by the Constitution. The first step is the submission of a proposal for an amendment by a two-thirds vote of Congress, then follow thirty-six partial steps, constituting all together a single step in the process—ratification or assent thereto by the legislatures of three-fourths of the several states—no one of which of itself constitutes a complete step. It can not become complete or effective without the concurrent action of the legislatures of thirty-five other states. It is the theory of the Constitution and of the very genius of our institutions, that the making of the National Constitution was the act, not of separate and disassociated sovereign peoples but of one people. The covenant is not "we, the states," but "we, the people"; not "we, the people of the State of Ohio," but "we, the people of the United States do ordain and establish this Constitution for the United States of America."

The legislatures of the several states are simply the agencies representing the people of the several states, selected by the Government of the United States through

which, and by whose act of ratification, the Government at Washington ascertains the fact that the people of the United States—all the people—not of one state, but of three-fourths of the states, ordain and establish a change in the Nation's organic law. These legislatures speak for their respective peoples not as distinct and separate peoples, but as certain designated parts of "we, the people of the United States."

The third and final step in the making of an amendment, is the ascertainment by the duly selected agency of the United States Government, of the fact that at least thirty-six ratifying agencies have ratified the amendment, and having ascertained the fact, the proclamation of it.

A state legislative power is capable of the full and complete exercise of every legislative function without let or hindrance from, or by, any outside power or agent. The legislative power of a state, whether it be vested in a legislature of the government of the state, or in the legislature of the government plus the people of the state, or the electors of the state, has within itself the ability to function with completeness and effect.

It can make a law, complete, full fledged, and effective —a living vital thing. This fact alone distinguishes that power from the ratifying function devolved upon the legislative agency selected by the Federal Constitution. The legislative power of a state comes from within, springs out of the inherent power of its people—the ratifying authority of the legislature of a state comes from without—a thing delegated by the Government of the United States, representative of all the people, through a National Constitution. Neither the state nor its people conferred the ratifying power and never having conferred

it, neither it nor its people can withdraw it. The power was conferred by another and greater sovereignty and can only be withdrawn or limited in its exercise by the power that conferred it.

The legislative power of a state may not only enact legislation, it may repeal it, or amend it, at will; but the legislature of a state cannot change by the crossing of a t or the dotting of an i a proposal for a constitutional amendment to the Federal Constitution submitted to it by the Congress of the United States for ratification. It must accept it or let it alone. It can only vote, either "aye" or "nay."

LEGISLATURE CANNOT RESCIND ITS RATIFICATION.

Having once ratified, it cannot recall its action, for in the act of ratification it exhausts its power. Having proclaimed its "aye" and recorded its vote, its function is ended. In Watson Const., Vol. 2, 1316, is the following statement, which we believe to be accepted law:

> It is interesting to note in this connection, as an historical fact demonstrating the attitude of the Federal Government, that according to their admitted and accepted practice, if a state legislature has once ratified a federal amendment a subsequent legislature has no power to rescind such ratification. Such rescision was attempted by Ohio and New Jersey with reference to the fourteenth amendment, and by New York with reference to the fifteenth, but the proclamation of the secretary of state for the United States was issued announcing the final adoption of the amendments as a part of the Federal Constitution, notwithstanding the attempted rescision by subsequent legislatures. The attempted rescision was ignored.

Commenting upon this fact, the Supreme Court of Maine, *in re* Opinion, *supra*, puts it well:

> If a subsequent legislature cannot rescind the ratification by a former legislature, it would seem that much less could such ratification be rescinded by the subsequent vote of the people, especially in view of the fact that the people have unreservedly surrendered all authority over that subject matter.

If the ratifying agency designated by the Constitution, at a time when it represents the complete law-making power of the state, save that shared by the Governor, cannot recall its act of ratification—and as we have just seen, it cannot—how can it be said that the people, upon whom the Constitution devolves no power to ratify, may recall the act of ratification. It seems to us there is but one answer: "There is no way under Heaven or among men, save by armed revolution—the power of might arrayed in battle."

LEGISLATIVE POWER LIMITED.

Again, we quote from the dissenting opinion of Judges Parker and Mitchell in the case of *State v. Howell*, *supra*. Speaking of the decisions in *Schrader v. Polley* and *Davis v. Hildebrant*, *supra*, relied upon by the majority of the Washington Court, they say, as we have already seen:

> The question in each of these cases was as to whether or not an act passed by the representative legislative law-making body of the state, called "legislature" in South Dakota, and "general assembly" in Ohio, dividing the state into congressional districts, and providing for the election of representatives in Congress therefrom, was subject to a referendum vote of the people of the state under the initiative and referendum provi-

> sion of its Constitution; those courts deciding that such an act was subject to a referendum vote of the people. It seems to me at once apparent that there is a marked distinction between the legislative power reserved to the several states by the provisions of Section 4, Article 1, of the Federal Constitution, and the provisions of Article 5, of that instrument, providing the manner in which the respective states and the people shall express their ratification of proposed amendments to that instrument. The former is the enactment of law, the prescribing of a rule of conduct, by the sovereign legislative power of the state, subject, of course, to be superseded by laws which may be enacted by congress, but nevertheless within itself an act of legislation, completed or to be completed by the sole legislative power of the state; and the fact that such legislation may have to give way to some higher law which congress may enact, does not in the least change the fact that it is an act done by the legislative power of the state, in the doing of which no other state or power has any voice whatsoever. The latter is but the casting of the vote of the state and its people upon the question of amending the Federal Constitution, in the manner provided for by the terms of that instrument; a question not of state legislation, but of national legislation, in which each state has but one vote. I think that the South Dakota and Ohio decisions are of no controlling force in the solution of this problem.

It has been held that the proposing of a constitution, or amendments to an existing one, is not the exercise of legislative power vested in the General Assembly of the state by a general grant, such as that contained in the following clause, found, either in exact form or substance in most American state constitutions:

> The legislative authority of the state shall be vested in the General Assembly.

Such power must be granted by a constitutional pro-

vision specifically authorizing the proposal of amendments.

Chicago v. Reeves, 220 Ill. 274; 77 N. E. 237-9-240;

Livermore v. Waite, 102 Calif. 113; 36 Pac. 426, 25 L. R. A. 312;

Warfield v. Vandiver, 101 Md. 78; 60 Atl. 538-540-542;

Commonwealth v. Griest, 196 Pa. 396; 46 Atl. 505; 50 L. R. A. O. S. 568;

Kochler v. Hill, 15 N. W. 609;

Morris v. Mason, 9 So. 776;

In re Senate File, No. 31, 41 N. W. 981, 25 Neb. 864;

Hatch v. Stoneman, 66 Calif. 632; 6 Pac. 734;

Oakland Paving Co. v. Hilton, 69 Calif. 479; 11 Pac. 3;

Edwards v. Lesueur, 132 Mo. 410; 33 S. W. 1130;

Holmberg v. Jones, 65 Pac. 563 (Idaho);

In re Denny, 156 Ind. 104;

Van Horn v. Dorrance, 2 Del. 304;

Cooley's Constitutional Limitations, (7th Ed.) 126;

Jameson Constitutional Conventions, (4th (Ed), 84, 359, 211, 388, 550, 600, *et seq:*

Evansville v. State, 118 Ind. 426;

Yancy v. Hyde, 121 Ind. 26;

Ellingham v. Dye, 178 Ind. 336 at 343-348-357-361-380.

In the case of the *City of Chicago v. Reeves*, just cited, the Illinois Supreme Court said:

The right to propose amendments to the consti-

> tution is not the exercise of legislative power by the General Assembly in its ordinary sense, but such power is vested in the Legislature only by the grant found in the constitution, and such power must be exercised within the terms of the grant.

In *Livermore v. Waite, supra*, it was held:

> The Legislature is not in the exercise of its legislative power, or of any sovereignty of the people that has been intrusted to it, but is merely acting under a limited power, conferred upon it by the people, and which might with equal propriety have been conferred upon either house or upon the Governor, or upon a special commission, or upon any other body or tribunal.

In *Commonwealth v. Griest, supra*, the Supreme Court of Pennsylvania said:

> It is not law-making power, which is a distinct and separate function, but it is a specific exercise of the power of the people to make its constitution.

Judge Jameson says on page 578, as to whether proposing amendments is fundamental or ordinary legislation:

> When the legislative action consists simply in affirming, by a resolution intended only as a step preparatory to further and other action either of that or of some other body, the expediency of amending the constitution, or in merely proposing such amendments as it deems desirable, such action cannot properly be called legislative.

The question decided in these cases is closely analagous to the question here under discussion. If the act of proposing an amendment to a state constitution is not a legislative act in the ordinary sense of the term, how can it be said that the act of ratification of an amendment to the Federal Constitution by a state legislature is a

legislative act? The principle involved is the same with the additional fact that the power of ratification in the case of a national amendment comes from the national government and not from the state, which adds substantial and controlling weight to the proposition that ratification is not a legislative act.

As herein before suggested, ratifying resolutions are not required to be submitted to the Governor of a state for his signature or even his consideration. In re Senate File 31, reported in 25 Neb., page 864, the Supreme Court of that state said:

> It will be conceded that under our constitution it is unnecessary to submit a proposition to amend the constitution, duly passed by each branch of the legislature, to the governor for his approval, as such proposition is not ordinary legislation.

The Supreme Court of California in *Hatch v. Stoneman*, 66 California 632, on page 634, held:

> The proposal of the amendment or amendments is not by the legislature, as such, in the ordinary enactment of a law, and with the proposal the Governor has nothing to do.

In *Warfield v. Vandiver*, 60 Atl., page 538, the Supreme Court of Maryland held that the proposal to amend the constitution was not legislation and hence the bill proposing constitutional amendments was not required to be submitted to the Governor for any action. The same is true of a ratifying resolution.

Certainly it cannot be said in the face of these authorities, or on reason, that the act of ratification of a Federal amendment by a state legislature is a legislative act done in the exercise of a state's law-making power. If this cannot be said, then the referendum clause in the

Ohio constitution by which ratification of Federal amendments by the legislature is suspended, cannot be sustained.

5. Congress alone under the Constitution has power to ascertain and proclaim the fact of ratification and to designate an agency to make such ascertainment and proclamation. In the exercise of that power it has determined the manner of ascertainment of the fact of ratification and of its proclamation, and its determination thereof is final and conclusive.

Congress alone may choose the mode of ratification within the limits of the discretion permitted it in Article V.; that is, it may select, as the ratifying agencies, either the legislatures of the several states or conventions. Within this limitation it has exclusive power.

The constitution does not designate a body to determine when such amendments have been ratified, or the validity of the acts of ratification. But Congress may choose the mode of ratification and in paragraph 18, Section 8 of Article I, of the Constitution, it is impowered:

> To make all laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States or in any Department or Officer thereof.

The power here conferred authorizes the Congress to make a law "to carry into execution" the ratification provisions of Article V.

Acting under that authority, Congress has passed a law in the matter providing:

> That, whenever official notice shall have been received at the Department of State that any Amendment proposed to the Constitution of the United States has been adopted according to the provisions of the Constitution, it shall be the duty of the Secretary of State forthwith to cause the said Amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the states by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.

Stat. at Large 439; RS. Section 205; U. S. Comp. Stat., Section 303.

The above statute was enacted April 20, 1818. Prior to its enactment, the first ten amendments had been communicated to Congress by the President, and the eleventh had been declared adopted by the President in a message to Congress, while the twelfth was declared adopted by the Secretary of State by proclamation.

Wambaugh, Cases on Constitutional Law 26, Note 1;

Wambaugh, Cases on Constitutional Law 27, Notes 1 and 2.

After the Act of 1818, Secretary Seward referred to Congress ratifications made of doubtful validity by subsequent rejections, and Congress by resolution declared the amendment adopted.

Jameson Constitutional Convention, (4th Ed.) pages 582, 583;

Watson Const. 1314 and 1315.

The Congress, being clothed with the authority to choose the mode of ratification and to enact a law for the

execution of the act of ratification, according to the mode selected by it, and having by law selected the agency and the manner of ascertaining the fact of ratification and clothed the agency so selected with authority to proclaim the fact of ratification, naming in its certificate the states that have adopted the amendment, and proclaiming the fact of ratification and the validity of the act thereof, no other agency or power can declare the ratification by any state to be invalid.

The State of Ohio, therefore, had no power to provide in its constitution for a referendum on the act of ratification by its legislature or to suspend the taking effect of such act or to make it invalid, as it attempts to do, "until and unless" such act of ratification shall be confirmed by a vote of the majority of the electors of Ohio in a referendum plebiscite.

The action of Congress in enacting such a law and in designating the Secretary of State as the authority to ascertain the fact of ratification and to proclaim the adoption and the validity of the amendment, according as the information and the facts shall be found by him, is conclusive as against all other agencies.

Constitution making is a political question and inheres in the political departments of the Government of the United States—the legislative and executive departments—and where the legislative department has designated an agency to ascertain and proclaim the fact of ratification, the courts, to avoid conflict, refrain from any act looking to the overthrow of the decision and action of such department.

Legal Tender Cases, 110 United States 421;
Prize Cases, 2nd Black, (U. S.) 635;

Oetjen v. Central Leather Co., 246 United States 297;
Ricaud v. American Metal Co., 246 United States 304;
Jones v. United States, 137 U. S. 202;
Foster v. Neilson, 2 Pet. (U. S.) 253;
In re Cooper, 143 United States 472;
The James G. Swann, 50 Federal 108;
Miles v. Bradford, 22 Maryland 170;
Luther v. Borden, 7 How. (U. S.) 1, 39;
Pacific States, etc., Co. v. State of Oregon, 223 U. S. 118.

6. The referendum petition in the Ohio Constitution is invalid, being in contravention of the compact between the State of Virginia and the United States, and the people of the northwest territory, under which the State of Virginia ceded that territory to the United States with the covenant that the states formed from said territory should "be distinct republican states."

The referendum clause in the Ohio Constitution is contrary to the fundamental law not only of the State of Ohio, but to that of every one of the five states carved out of the northwest territory.

The last six clauses of the Ordinance of 1787 are not transient provisions, but permanent. They are not subject to repeal but are forever binding upon the State of Virginia, the Government of the United States, the people inhabiting the northwest territory, and of the states carved therefrom. They constitute a solemn compact and covenant indissolvable save by the mutual consent of Virginia, the Government of the United States and the

states of Ohio, Indiana, Illinois, Michigan and Wisconsin.

This court is, of course, familiar with every step and detail of that great compact and of every step connected with its enactment, and the reasons therefor, and yet, we venture a brief review of them that the court may have them before it for consideration in connection with the matters here-in-after presented.

The evidential facts are historic and within the judicial cognizance of the courts.

TITLE IN GREAT BRITAIN.

a. At the date of the Declaration of Independence, the land north of the River Ohio belonged to Great Britain.

CONQUEST OF CLARK.

(1777.)

b. In 1777, Governor Patrick Henry, of the State of Virginia, commissioned George Rogers Clark to raise a force of *Virginia Militia* and take "by international law of conquest," from Great Britain all the land which was afterwards designated the "Northwest Territory." A military force, under the command of General Clark, financed by the State of Virginia, during the administrations of Governors Patrick Henry and Thomas Jefferson, succeeded in its mission after several years of warfare, and the flag of England was lowered and that of the State of Virginia raised over the Territory. Virginia established a court at Vincennes and the laws of Virginia became the laws of this Territory.

RESOLUTION OF VIRGINIA.

(January 2, 1781.)

c. "Resolution (of the General Assembly of Virginia) for a cession of the lands on the west side of Ohio to the U. S." "The General Assembly of Virginia * * * * preferring the good of their country to every object of smaller importance,

DO RESOLVE, That this Commonwealth will yield to the Congress of the United States, all right, title and claim that the said Commonwealth hath to the lands northwest of the river Ohio, upon the following conditions, to-wit:

That the states so formed shall be *distinct republican states*, and shall be admitted members of the federal union, having the same rights of sovereignty, freedom and independence as the other states."

Henings Statutes Va., Vol. 10, page 564.

VIRGINIA ACT OF SESSION.

(June 6, 1783.)

d. Authorizing the delegates of Virginia to the Congress of the United States to convey by deed to the United States.

"Upon condition * * * that the states so formed shall be *distinct republican states*."

Henings Stats., Va., Vol. 11, page 326.

ACCEPTANCE OF CONFEDERATED CONGRESS.

(September 13, 1783.)

e. "Upon condition * * * that the States so formed shall be distinct republican states."

Journal 8, 254, 260.

Virginia's Deed of Cession.

(March 1, 1784.)

f. "Convey, transfer, assign and make over unto the United States in Congress assembled, for the benefit of all the said states * * * subject to the terms and conditions contained in the before cited Act of Congress of September 13th, last, that is to say, upon condition * * *; that the states as formed shall be distinct *republican states*."

Hennings, Vol. II, page 571.

Confederation Congress Revision of Virginia Act of Cession.

(July 7, 1786.)

Ordinance of 1787—Confederation Congress.

(July 13, 1787.)

h. "Be it ordained by the U. S. in Congress assembled" * * * "It is hereby ordained and declared by the authority aforesaid, That the following articles shall be considered as Articles of COMPACT, between the original States and the people and states in the said territory, and *forever remain unalterable, unless by Common Consent*, to-wit:

* * * * *

Article 5. There shall be formed in the said territory not less than three nor more than five states, etc. * * * PROVIDED, The Constitution and government so to be formed *shall be republican*, and in conformity to the principles contained in these articles."

1. V. 1. U. S. 475.

MODIFIED CESSION OF VIRGINIA.

(December 30, 1788.)

i. Section 1. "Whereas, the United States in Congress assembled did on July 7, 1786, recommend a revision of the Act of Cession, so far as to empower Congress to make such a division of the said territory into *distinct republican states* * * * and the said United States hath in an ordinance * * * passed July 13, 1787, declared the following as one of the articles of Compact between the original states and the people and states in said territory (here 5th Article of Ordinance of July 13, 1787, is recited) * * * This Commonwealth to assent to the proposed ratification * * *.

BE it enacted * * * That the aforesaid recited Article of Compact between the original States and the people and States in the territory northwest of the Ohio river be and the same is hereby ratified and confirmed * * * etc.

12 Hennings St. Va. 780.

ACT OF CONGRESS TO PROVIDE FOR THE GOVERNMENT OF THE TERRITORY NORTHWEST OF THE RIVER OHIO.

(August 7, 1789.)

j. "Whereas, in order that the ordinance of the United States in Congress assembled, for the government of the territory northwest of the River Ohio, may continue to have full effect, it is requisite that certain provisions should be made so as to adapt the same to the present Constitution of the United States." Then follows several short provisions regarding the Officers to be appointed by the President and Senate for the Government of the Territory.

U. S. Stat. at Large, Chap. 8, page 50.

ENABLING ACT OF CONGRESS.

(April 30, 1802.)

k. "An act to enable the people of the eastern division to form a constitution and state government, etc.

Section 5. "And be it further enacted, That the members of the convention, etc. * * * *Provided the same shall be republican* and not repugnant to the Ordinance of the 13th of July, 1787, between the original states and the peoples and states of the territory northwest of the River Ohio."

U. S. Stat. at Large, Vol 2, page 173.

ORDINANCE AND RESOLUTIONS PASSED IN CONVENTION BY OHIO DELEGATES.

(November 29, 1802.)

l. "Propositions accepted by representatives of the people of the Eastern Division in Convention."

CONSTITUTION OF OHIO.

(November 29, 1802.)

m. Preamble. "We, the people of the eastern division of the territory of the United States, northwest of the River Ohio, having the right of admission into the general government, as a member of the Union, consistent with the Constitution of the United States, THE ORDINANCE OF CONGRESS OF 1787, AND OF THE LAW OF CONGRESS, ENTITLED 'AN ACT TO ENABLE THE PEOPLE OF THE EASTERN DIVISION OF THE TERRITORY OF THE UNITED STATES, NORTHWEST OF THE RIVER OHIO, TO FORM A CONSTITUTION AND STATE GOVERNMENT * * *.'"

ACT OF CONGRESS RECOGNIZING STATE OF OHIO.

(Feb. 19, 1803.)

a. "Whereas the people of the eastern division of the territory northwest of the River Ohio, did, on the 29th day of November, 1802, form for themselves a constitution and state government," etc.

U. S. Stats. at Large, Vol. 2, page 201.
Thorpe's Am. Const. Vol. 5, page 2900.

Here is a cession by the State of Virginia of a vast tract of land to the general government made on a compact and COVENANT RUNNING WITH THE LAND as it were —a covenant that "the Constitution and Government (of the states to be formed on the lands so deeded) shall be republican, and in conformity to the principles contained in these articles."

Here is also acceptance by the Congress through a provision in the ordinance it adopted, that such states should be "republican in their form of government" and be "distinct republican states" and that such provision should be a "compact between the original states and people and states in said territory, and forever remain unalterable unless by common consent."

There is, also, in this connection, the formation and adoption of the Constitution for the United States guaranteeing by one of its express provisions "a republican form of government" to every state.

Here is also the act of Congress enabling the people of the eastern division of the northwest territory, to form a constitution and state government, "provided the same shall be republican and not repugnant to the Ordinance of the 13th of July, 1787, between the original states and the people and states of the territory northwest of the River Ohio."

Here, too, is the acceptance by the people of Ohio in convention assembled, of the enabling act passed by Congress.

And here is the Constitution drafted by the Convention

and subsequently adopted by the people of the State of Ohio, coming into the union on terms "consistent with the Constitution of the United States, the Ordinance of Congress of 1787, and the law of Congress entitled, 'An act to enable the people of the eastern division of the territory of the United States northwest of the Ohio River, to form a constitution and state government.'"

The whole amounts to a deed and transfer of land and sovereignty, made on condition that the states, which should be born of it, should be "distinct republican states," and the acceptance of the deed and its terms by the National Government and by the people of the State of Ohio.

If these several instruments and acts do not constitute an irrevocable covenant, then states and nations are without language, terms, or power to make such a covenant.

But it *is* a covenant, solemn, binding and perpetual, and has been recognized as such by the State of Virginia, by every department of the National Government, by the people inhabiting the five states formed out of the land conveyed, and by the states themselves.

The Indiana Constitutional Convention held under the enabling act authorizing its organization as a state, furnishes a convincing example of the sort of acceptance of the covenant in the Ordinance of 1787 and of the enabling act passed by Congress:

> Be It ordained * * *:
>
> That we do for ourselves and our posterity, agree, determine, declare and ordain, that we will, and do hereby, accept the propositions of the Congress of the United States as made and contained in their act of the 19th day of April, 1816, entitled * * *.
>
> And we do, moreover, for ourselves and our posterity, hereby declare and ordain that this ordinance and every part thereof shall forever be and remain irrevocable and inviolate, without the consent of the United States in Congress assembled first had and obtained for the alteration thereof or any part thereof.
>
> (Signed) JONATHAN JENNINGS,
> President of the Convention.
>
> Attest: WILLIAM HENDRICKS, Secretary.

We are clearly within the facts when we state that each of the five states, though in language somewhat varied, solemnly entered a like acceptance of such ordinance and the Congressional enabling acts relating thereto.

It is important to note here, and in this connection, and to bear the fact in mind, that the enabling act of Congress for the admission of Ohio and for each of the other four northwest territory states, was passed after the formation of the American Union and the adoption of the Federal Constitution, and the organization of the Federal Government, and is a recognition by the Government of the United States and of the political branch of it, that the last six articles in the Ordinance of 1787 was then a valid and binding covenant, the terms of which as to each of the new states, being "distinct republican states," it scrupulously conformed to, by providing that "the same shall be republican and not repugnant to the Ordinance of 13th of July, 1787."

The compact contained in this ordinance so solemnly entered into and so clearly and unequivocally accepted, is still held in force by the courts of the five states coined out of this Land Northwest of the River Ohio, and by the Federal Courts as well. The decisions of these courts, relating to the question under consideration, are of course familiar to the members of this high Tribunal, but we venture to review them here and in this connection.

Federal Cases in Ohio and Indiana.

Spooner v. McConnell, 1 McLean 337, (1838);
Palmer v. Com., 3 McLean 226, (1843);
Vaughan v. Williams, 3 McLean 530, (1845);
Jolly v. Terre Haute, 6 McLean 235, (1853).

1. *Spooner v. McConnell*, 1 McLean, 337, s. c. No. 13245, Volume 22, Federal Cases. This case was heard by Mr. Justice McLean and Judge Leavitt in the United States Circuit Court for Ohio in 1838.

Mr. Justice McLean said:

> It is a well-established principle that no political change in a government annuls a compact made with another sovereign power, or individuals. The compact is protected by the sacred right of plighted faith, which should be cherished alike by individuals and organized communities * * *.
>
> This compact was formed between political communities and the future inhabitants of a rising territory and the States which should be formed within it.

This is a fundamental rule of international law. "Nations ought inviolably to observe their promises and their treaties." Vattel, Ch. 12.

Judge Leavitt reviewed at length the history of the times leading up to the ordinance, and then said:

> When it is declared to be the intention of the articles of the compact to extend the fundamental principles of civil and religious liberty, and to fix and establish those principles as the basis of all laws, constitutions and governments which forever hereafter shall be formed in said territory, there can be no hesitancy in saying it was designed to lay a strong and enduring foundation on which the structures of governments should be based.

Both agreed when a provision of the subsequent Federal Constitution was different from the ordinance, such provision of the ordinance was superseded, otherwise, not. In illustration, Mr. Justice McLean said the 6th article prohibiting slavery remained. The provisions of Article 2, touching the inviolability of private contracts, was carried forward into the Constitution. But there is nothing

found in the Federal Constitution in conflict with the rule of "proportionate representation" as established in the Ordinance.

In *Vaughan v. Williams*, 3 McLean 530, s. c. No. 16903, Vol. 28, Federal Cases, an Indiana case, Mr. Justice McLean said:

> When the people of Indiana came into the Union as a State, they were as much bound by the Constitution of the United States as the people of any other State. And any part of the ordinance which conflicts with the Constitution of the Union, so far as the State of Indiana is concerned, was consequently annulled.

Which is to say the articles not in conflict remain. And this was his well-known view.

Spooner v. McConnell, supra, was affirmed by Mr. Justice McLean in *Palmer v. Cuyhoga Co.*, 3 McLean 226, s. c. 16088, 18 Fed. Cas. 1026, and by Judge Leavitt in *Jolly v. Terre Haute Bridge Co.*, 6 McLean 237, s. c. No. 7441, 13 Fed Cas., p. 919; citing *Hogg v. Zanesville, etc., Co*, 5 Ohio 416.

INDIANA.

This court, from the beginning, has recognized the ordinance as a fundamental charter of our State government.

1. In *Henthorn v. Doe*, 1 Blackf. 157 (1822), the court recognized the Virginia cession of December 20, 1783 (R. S. 1843, page 16), and the deed thereunder, as being in force and obligatory in our courts, saying:

> Prior to the year 1783 the State of Virginia had the sovereignty of all this territory now included in the States of Ohio, Indiana and Illinois. By her act of cession to the United States in 1783, and her deed in conformity thereto, she transferred all her territory northwest of the Ohio River, saving and excepting certain reserves.

And the court held Virginia, under the clause in the Act of Cession providing for General Clark and his regiment, "according to the laws of Virginia" had legislative power as to Clark's grant, and rightfully passed laws "on the subject of these lands."

That is to say, the Act of Cession of 1783 was not annulled *in toto* by the Federal Constitution.

2. In *Cox v. State*, 3 Blackf. 194 (1833), it appeared that Cox had built a milldam across White River. He justified, under an act of the State dated January 13, 1826. The act was held invalid, because:

(1) By the latter clause of the 4th article of the Ordinance of 1787, White River became and remained a common highway and forever free.

(2) And that ordinance was in force in this State because:

> The act of Congress of the 19th of April, 1816, is the act enabling the people of Indiana Territory to form a constitution and State government; and the proviso to the 4th section declares—that the articles of the ordinance of the 13th of July, 1787, are irrevocable; and that the constitution and State government of the territory, when formed, should not be repugnant to those articles; and the Ordinance of Indiana of the 29th of June, 1816, accepts the propositions and conditions of that act of Congress.

And farther on the court says:

> The ordinance of Congress of the 13th of July, 1787, which is made perpetual and irrevocable between this State and the United States by the act of Congress of the 19th of April, 1816, and the Ordinance of Indiana of the 29th of June, 1816, puts it out of the constitutional power of either the State or the United States to authorize such an obstruction.

The same reasoning must apply to the provision for proportionate representation.

This case was approved in *Williams v. Beardsley*, 2 Ind. page 596 (1851). We also cite:

Vaughan v. Williams, 3 McLean 530 (1845);
Jolly v. Terre Haute, 6 McLean 235 (1853);
Depew v. Wabash, 5 Ind. 8.

MICHIGAN.

In *Giddings v. Blackner*, 52 N. W., foot page 946, in discussing an apportionment act, it was said:

> It (equality of representation) lies as the basis of our free government. It is guaranteed not only by the constitution, but by the Ordinance of 1787, organizing the territory out of which the State of Michigan was carved.

ILLINOIS.

In 1825 the Supreme Court of Illinois held in *Phœbe v. Jay*, 1 Breese 268, that the Ordinance of 1787 was binding on the people of that State, except as abrogated by common consent. Later in *People v. Thompson*, 40 N. E. 312-313, it appears the counsel on neither side contended that the ordinance was in force. And the court, in a dictum, seemed to think that it was not.

WISCONSIN.

In the case of *Connecticut Ins. Co. v. Cross*, 18 Wis. 109, the court was of the opinion that the ordinance was in force in that State, except as to such parts as were in conflict with the provisions of the Federal Constitution.

See

Milwaukee, etc., v. Schoener, etc., 23 Wis. 144;
Wisconsin, etc., v. Lyons, 30 Wis. 61;
Attorney-General v. Eau Claire, 37 Wis. 400.

The question came fairly before the Supreme Court of Wisconsin in the case of *State v. Cunningham*, 51 N. W. 724 (1892). This was an original suit in the Supreme Court to enjoin the Secretary of State from carrying into execution the statute of 1891 on the subject of apportionment for legislative purposes. The court held (1) it had jurisdiction over the question; (2) that the Secretary of State was not immune from judicial process to restrain action under the constitutional act; and (3) that the act was void, because:

> This apportionment act violates and destroys one of the highest and most sacred rights and privileges of the people of this State, guaranteed to them by the Ordinance of 1787 * * * (foot page 729).

It is for the courts of these five States, severally, to decide for their respective States whether the ordinance requires the States to give their peoples "proportionate representation in the Legislature." We insist that the article of the Ordinance of 1787 on this subject, is the law of Indiana, first, by virtue of its own force, and second, by the Enabling Act of April, 1816, and the ordinance of this State.

OHIO.

The Supreme Court of Ohio, with a single exception, has always held the ordinance to be in force.

Hogg v. Mfg. Co., 5 Ohio 410, 416;
Hutchinson v. Thompson, 9 Ohio 52, 62;
Cochran's Heirs v. Loring, 17 Ohio 409, 424-5;
Betts v. Wise, 11 Ohio 219 (1842);
Lyon v. Lyon, 1 O. C. C. (N. S.) 246;
STATE V. BOONE, 84 O. S. 346, (1911), 95 N. E. 924.

In the last case the court holds the clause in Article 2 of the ordinance that "should the public exigencies make it necessary for the common preservation to take any person's property, or to demand his particular services, full compensation shall be made for the same," is now in force.

And the court stands firm that the Constitution of the United States does not mean "that all State constitutions shall be, or are, alike; nor that a new State erected in the Northwest Territory shall be understood to surrender all the guaranties of the compact as a condition of admission as a State."

The courts of none of the five Northwest-territory states have more faithfully, soundly or eloquently upheld the inviolability of this compact than did the courts of the State of Ohio for almost a century.

The opinion of the Supreme Court of Ohio in *State v. Boone, supra,* is so cogent and unanswerable in its reasoning, that we quote from it, beginning on page 354:

> * * * This language should be read in the light of the facts of that case; but, assuming that it correctly states the law in its general application, there is grave reason to doubt whether it is sound law in this jurisdiction, owing to specific provisions of the Ordinance of 1787.
>
> The purview of that famous act of Congress is expressly "for the government of the territory of the United States northwest of the River Ohio." The first twelve sections of the ordinance obviously provided for the temporary government of the territory until it should be divided and organized into states. Then follows something of more enduring interest. We quote:
>
> "And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and

governments, which forever hereafter shall be formed in said territory; to provide, also, for the establishment of states, and permanent government therein, and for their admission to a share in the federal councils on an equal footing with the original states, at as early periods as may be consistent with the general interest. It is hereby ordained and declared, by the authority aforesaid, that the *following articles shall be considered as articles of compact*, between the original states and the people and states in said territory, *and forever remain unalterable, unless by common consent*, to-wit:" Then follows the several articles of compact * * *.

Perhaps it may be said that the adoption of a constitution by the people of Ohio superseded the Ordinance of 1787, and that the constitution of Ohio contains no such provision as that which we have quoted from Article II of the Ordinance of 1787. We recur again to the "articles of compact" and quote from Article V: "And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original states, in all respects whatever; PROVIDED, *The Constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles.*" If our constitution, instead of creating a republican form of government for the state, had provided a pure democracy, a government directly by the people, and, so framed, it had been accepted by the president and congress of the United States, there might have been some reason for the claim that, in that respect, the compact which was to "remain forever unaltered, unless by common consent" had been repealed by implication; yet under such circumstances, conclusive presumption would not be raised that the compact had been altered, without the common consent of all the parties thereto. But if the convention which prepared our constitution had omitted the

Bill of Rights, the famous interdiction against slavery, contained in Article VI of the ordinance, would that have justified the conclusion that the compact was altered and that the existence of slavery in Ohio would be constitutional? Or, to put the question in another form, if our constitution contained nothing whatever in regard to the privilege of the writ of habeas corpus, or to trial by jury, or to proportional representation of the people in the legislature, or to the prohibition of cruel and unusual punishments, it could not be justly inferred that the great compact had been altered and that these privileges and guaranties had been subtracted from the rights of the citizens, and were not included among the rights reserved by the people (Const. of Ohio, Art. I, Sec. 20); because there would have been nothing in the constitution which was inconsistent with the ordinance and the declared purpose thereof "to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory," and these "articles shall be considered as articles of compact between the *original states* and the *people* and *states* in the said territory, and forever remain unalterable, unless by common consent."

In *Hogg v. Mfg. Co.*, 5 O. Rep. 410, at page 416, Hitchcock, J., speaking of a clause in Art. IV of the ordinance, said, "This portion of the ordinance of 1787 is as much obligatory upon the State of Ohio as our own constitution. In truth, it is more so; for the constitution may be altered by the people of the state, while this cannot be altered without the assent both of the people of this state and of the United States, through their representatives. It is an article of compact, and until we assume the principle that the sovereign power of the state is not bound by contract, this clause must be considered obligatory." And in *Hutchinson v. Thompson*, 9 O. R. 52, at page 62, Grunke, Judge, remarked: "But when application for admission into the Union was made by the people inhabiting

the eastern part of the territory, modifications in several parts of the Ordinance were asked for, and they were granted by the United States, as one party, to the state, as the other. This seems to show that the people of Ohio have, so far, treated the Articles of Compact as of perpetual obligation. The alterations proposed were with a view to the immediate formation of a state constitution, and were of no importance if the state should have a right to annul the ordinance the moment it assumed that condition."

Similar language is found in the opinion in *Cochran's Heirs v. Loring*, 17 O. R. 409, 424, 425, and the foregoing quotations remain as the unmodified expression of this Court, upon this subject.

We are not unaware of various dicta which have appeared from time to time in opinions by learned justices of the Supreme Court of the United States, beginning with *Pollard's Lessee v. Hagan*, 3 Howard, 212 and *Permoli v. First Municipality*, 3 Howard, 589, 616; *Strader v. Graham*, 10 Howard 82. But it requires no acute analysis to differentiate those cases, and to show that they do not go very thoroughly into the question whether the Ordinance of 1787 can be superseded otherwise than by the "common consent" of the parties to the Compact, as required by the terms of the Ordinance, or whether such common consent ever has been given; and, giving the fullest effect that can be claimed from those remarks by the distinguished judges, it is obvious that they ignore the distinction between a mere act of Congress, which may be repealed or superseded by subsequent acts, and a solemn and formal compact in the nature of a treaty, as it were, between the proprietary states and the people as states of the territory, which was subsequently to be erected into several states of the Union.

The compact, on the good faith of which the original proprietors ceded this territory to the United States, expressly declared that the principles declared therein shall be the basis of "all laws, constitutions and governments which forever

hereafter shall be formed in the said territory," and at best, these declarations rest on no stronger foundation than the provision of the compact itself, namely, that a state with constitutional limitations, as provided, "shall be admitted, *by its delegates*, into the Congress of the United States, on an equal footing with the original states, in all respects whatever." See cases above cited and *Escanaba Co. v. Chicago*, 107 U. S. 678, 688, 689; *Van Brocklin vs. Tenn.*, 117 U. S. 151, 159; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 295, 296; *Williamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 9-10. Whatever that clause may mean, it certainly does not mean that all state constitutions shall be, or are, alike, nor that a new State erected in the Northwest Territory shall be understood to surrender all the guaranties of the compact as a condition of admission as a state.

We have thus briefly indicated the reasons for our belief, that the Great Charter of the Northwest Territory is still under, and above, and before, all laws or constitutions which have yet been made in the States which are parts of the territory.

In *Hogg v. Zanesville*, *supra*, appears the following:

This portion of the ordinance of 1787 is as much obligatory upon the State of Ohio as our own constitution. In truth, it is more; for the constitution may be altered by the people of the state, while this can not be altered without the assent both of the people of this state and of the United States, through their representatives. It is an article of compact, and until we assume the principle that the sovereign power of the state is not bound by compact, this clause must be considered obligatory.

In *Hutchinson v. Thompson*, *supra*, the court said:

The ordinance consists of two parts; first, of a constitution of government for the then territory; and secondly, of articles of compact, which were intended to look beyond the period when the people should emerge from their territorial condition, and

become members of the union. I have called this part a compact, because it is so termed in the instrument; but if it were not for some things which have since taken place, there might be great difficulty in regarding it in that light. There was, in reality, but one party to it, originally, and that was the general government. But when application for admission into the union was made by the people inhabiting the eastern part of the territory, modifications in several parts of the ordinance were asked for, and they were granted, by the United States as one party, to the state, as the other. This seems to show, that the people of Ohio have, so far, treated the articles of compact as of perpetual obligation. The alterations proposed were with a view to the immediate formation of a state constitution, and were of no importance, if the state should have a right to annul the ordinance the moment it assumed that condition. The state may thus, by its own act, have converted that into a compact which was before only a fundamental act of Congress.

In *Cochran's Heirs v. Loring supra*, there is this like affirmance of the compact's sanctity:

> This article follows a declaration in the ordinance to this effect: "It is hereby ordained and declared, by authority aforesaid, that the following articles shall be considered as articles of compact between the original state in the said territory, and forever remain *unalterable*, unless by common consent." The principles declared in these articles, and they are similar in character to principles declared in a bill of rights, are to prevail not only during the territorial government, but for all coming time. They must "*forever remain unaltered.*"
>
> *Lake Shore &c. R'y Co. v. Cleveland &c. R'y Co.*

We are not unaware that the Supreme Court of Ohio, in the case of *Dunlap v. Edmundson*, 29 O. St. 92, by a

divided opinion, erroneous, and we believe invalid, held that the Ordinance of 1787 was entirely superceded by the Constitution of Ohio.

The portion of the opinion and syllabus on the question of the validity of the Ordinance of 1787 is SIMPLY JUDICIAL OBITER. The question was not within the issues of the case submitted as may be seen by referring to a copy of the petition in the case of *Donahey v. Edmondson*, which petition we print as an appendix. There was in the issues nothing upon which to found that portion of the opinion.

In the words of the dissenting opinion of Judge Wanamaker:

> 1. The Ordinance of 1787 has absolutely no relevancy in this case, and is even more inapplicable and foreign to it than was this same ordinance in the case of *State of Ohio v. Boone*, 84 Ohio St. 346.
>
> The question in each one of these cases was: Is a certain act, passed by the general assembly of this state, contrary to the constitution of this state?
>
> The question is not: Is the act in question contrary to the Ordinance of 1787, or is it contrary to the Ten Commandments or the Lord's Prayer? One inquiry is about as relevant as the other.
>
> 2. This court can no more abolish or eliminate the Ordinance of 1787 than it can abolish or eliminate the American Declaration of Independence or the English Magna Charta. The Turkish pasha, with equal propriety, might issue a decree repealing our federal constitution and the Russian czar a similar edict nullifying our American democracy.

We strongly maintain that this portion of the syllabus and of the opinion holding the ordinance to have been superseded by the Constitution of Ohio, is but *obiter dicta*, it is without force or effect—a judgment outside the issues. *Carroll v. Lessee of Carroll*, 16 How. 275-286.

The rule laid down in the Carroll case is so well established and so universally accepted by the courts of the country, that we content ourselves by quoting from the decision in that case, without citing additional authorities:

> If the construction put by the Court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs.
>
> And, therefore, this Court and other courts organized under the common law, has *never held itself bound by any part of an opinion in any case* which was not needful to the ascertainment of the right or title in question between the parties. In *Cohen v. State of Virginia*, 6 Wheat. 399, this Court was much pressed with some portion of its opinion in the case of *Marbury v. Madison*. And Chief Justice Marshall said:
>
> "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason for this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

There are some cases which, when casually read, seem to sustain the doctrine that the compact in the Ordinance is no longer valid or binding either in Ohio or elsewhere.

Pollard v. Hagan, 3 How. 212, 11 L. ed. 565;

Permoli v. New Orleans, 3 How. 589, 11 L. ed. 739;

Escanaba, etc., Co. v. Chicago, 107 U. S. 678, 688, 27 L. ed. 442, 446;

Lewis Sands v. Manistee, etc., Co., 123 U. S. 288;

City of Cincinnati v. Louisville, etc., Co., 123 U. S. 389.

A study of these cases, however, shows that in none of them was involved the question as to whether the provision in the Ordinance of 1787, to the effect that each of the states carved out of the Northwest Territory should have a "republican form of government" and be a "distinct republican state."

A brief statement of the issues presented to the Supreme Court of the United States in each of the cases, is sufficient to show that the question involved in the case at bar was not presented; and so could not be decided.

1. *Pollard's Lessee v. Hagan*, was an action in ejectment in the courts of Alabama and taken on writ of error into the United States Supreme Court. The land in controversy was under the navigable water of Mobile Bay when the United States acquired title on April 24, 1802, by a deed of cession from Georgia quite like that from Virginia, only that the sixth article (forbidding slavery) was omitted. Afterwards, Alabama was made a State and admitted into the Union. Thereafter the United States by patent conveyed the land in dispute, under which patent the plaintiffs claimed title. Afterwards, the shore was filled out and became a lot in the city of Mobile. And the question was whether the United States took a vendable

right in the land covered by navigable waters under the deed from Georgia.

It was held not, because "to give the United States the right to transfer to a citizen title to the shores and soils under the navigable waters would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprive the States of the power to exercise the numerous and important classes of police powers." (Page 230.)

Of course this does not resemble the case at bar.

2. *Permolli v. Municipality* (New Orleans), 3 How. 589. The City of New Orleans for sanitary purposes had an ordinance making it a penal offense for any person to officiate at a funeral at any church except in the obituary chapel." Permoli, a priest, was charged with the violation of this ordinance. He admitted he had officiated in a church where the coffin was opened in public. He plead the ordinance was void because, after the Louisiana purchase in 1803, by the act of Congress of 1805, it was enacted that the inhabitants of the Orleans territory should enjoy all the rights given to the inhabitants north of the river Ohio under the Ordinance of 1787, except one clause prohibiting slavery.

Permoli bottomed his contention on the provision in Article I of the Ordinance of 1787, that "No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments in the said territory."

Religious freedom does not mean liberty to expose an infectious body in public.

3. *Strader et al. v. Graham*, 10 How. 82, was a writ of error from the Supreme Court of Kentucky. The facts were that the defendants ran a line of steamboats on the

Ohio River. Graham brought an action in the chancery court at Louisville, charging that the defendants received three of his slaves on board the steamboat, Pike, at Louisville, and transported them to Cincinnati, Ohio, from whence they escaped to Canada, to his damage in the loss of their value. The defendants pleaded that the negroes were free men when received on board because prior thereto, Graham had permitted them, being musicians, to be for a time in Ohio, whereby they were made free. The plaintiff contended that inasmuch as his slaves had again returned to Kentucky and were held by him as slaves at the time of the transportation, they were his slaves. He recovered a judgment on this contention, which was affirmed by the Supreme Court of Kentucky. Both courts held that the colored men were in fact slaves. Only questions of law are presented on a writ of error from the Supreme Court of a State into the Supreme Court of the United States. And so the latter court held the judgment of the Kentucky courts "upon this point is, upon this writ of error, conclusive upon this court and we have no jurisdiction over the case." The judges engaged in a moot political discussion over the ordinance—but of course the court could not adjudicate upon the ordinance as they had no jurisdiction to try the case.

4. *Escanaba Company v. Chicago*, 107 U. S. 689. The Escanaba Company was a corporation created under the laws of Michigan and owned a line of vessels on the lakes, employed in carrying ore from Escanaba to the docks of the Union Iron and Steel Company on the river in Chicago. The lake and the river form a continuous highway for commerce among the States. The Daniel Ball, 10 Wall. 557. The city maintained across the river several

drawbridges. For the accomodation of the people of Chicago, an ordinance fixed certain hours of the morning and evening when the draws should be closed; and at other times the draws should not be opened for the passage of a vessel longer than ten minutes at a time.

The company brought its suit in the Circuit Court of the United States at Chicago, against the city, to enjoin it from closing the draws for the morning and evening hours, and enforcing the ten minutes' limitation, and to compel the removal of the bridges. The bill was based on that clause of Article 4 of the Ordinance of 1787, reading:

> The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other State that may be admitted into the confederacy, without any tax, impost, or duty therefor.

Applying the case to the above provision, the court declared:

> The navigation of the Illinois River (Chicago River) is free so far as we are informed, from any tax, impost, or duty, and its character as a common highway is not affected by the fact that it is crossed by bridges.

Having held that the bridges were not an illegal obstruction to navigation, it is plain to see that the question whether that clause of the ordinance was annulled by the Federal Constitution was not open to adjudication. Nevertheless, Mr. Justice Field, in the course of the opinion, said:

> Whatever the limitation upon her (Illinois') powers as a government whilst in a territorial condition, whether from the Ordinance of 1787, or the legislation of Congress, it ceased to have any op-

> erative force, except as voluntarily adopted by her, after she became a State of the Union. (P. 688).

So it is patent that the court could not and did not adjudicate that the Ordinance of 1787 was defunct in toto.

5. The Ordinance of 1787, was under discussion in the Insular Cases, reported in 182 U. S., pp. 1-391. The question in these cases was the status of the Philippines and Porto Rico. And one question was whether these islands occupied the same political status as the Northwest Territory under the Virginia cession and the Ordinance of 1787. And this brought forward a discussion, both at bar and from the bench, as to the scope and duration of that ordinance.

See pages 47, 171, 249, 279, 319, *et seq*

The fullest discussion was made by Chief Justice White. He said:

> The opinion has been expressed that the Ordinance of 1787, became inoperative and annulled on the adoption of the constitution. (Taney, C. J., in *Scott v. Sanford*, 19 How. 393, 438.) On the other hand, it has been said that the Ordinance of 1787 "was the most solemn of all engagements" and became a part of the Constitution of the United States by reason of the sixth article (U. S. Const.) which provided that "All debts contracted and engagements entered into before the adoption of this constitution, shall be as valid against the United States under this constitution, as under the confederation." Per Baldwin, J., concurring opinion in *Lessee of Pollard's Heirs v. Kibbe*, 14 Pet. 353, 417, and per Catron in dissenting opinion in *Strader v. Graham*, 10 How. 82, 98. Whatever view may be taken of this difference of legal opinion, my mind refuses to assent to the conclusion that under the constitution, the provision of the Northwest Territory ordinance making such territory forever a part of the confederation was not binding on the government of the United States when the constitution was framed.

6. In the Manistee River case, *supra*, while the Court, in passing, seemed to affirm the doctrine that the Ordinance was no longer binding in Michigan, the case was really decided "independently of these considerations," because "there is nothing in the language of the fourth Article of the Ordinance respecting the navigable waters of the Territory emptying into the St. Lawrence, which, if binding upon the state, would prevent it from authorizing the improvements made in the navigation of the Manistee River."

7. In the Cincinnati case, the Court laid down the rule to be:

> The Ordinance of 1787, as an instrument, limiting the powers of government of the Northwest Territory, and declaratory of certain fundamental principles which must find place in the organic law of states to be carved out of that Territory, ceases to be, in itself, obligatory upon such states from and after their admission into the Union as states, *except in so far as adopted by such states and made a part of the law thereof.* This has been the view of this Court, so often announced, as to need no further argument. (Italics ours.)

Further, in the opinion in the Escanaba case, *supra*, is quoted as holding that the Ordinance ceased to be an operative force in Illinois except as voluntarily adopted by her after she became a state of the Union.

In both these cases, it seems to us, the Court overlooked the fact that the Northwest-Territory states—especially Ind. and Ohio and Ill.—formally entered the Union with a solemn acceptance of the pact provisions of the Ordinance. Acceptance was made a condition of their entry and at the time of their entrance and the establishment of their constitutions, they accepted its covenants. We print as appendixes the Enabling Acts of Congress for the formation of the States of Ohio, Indiana and Illinois.

This has been, we think, the uniform holding in Indiana and certainly so in Ohio, with the single *obiter dictum* pronounced in *Donehay v. Edmondson, supra.*

The doctrine of sanctity and binding, controlling character of the pact contained in the great Ordinance stands; founded on reason, backed by precedent, in both Indiana and Ohio.

This being true, it is the duty of the Court to accept the fact and give it confirmation.

A Republican Form of Government.

With the guarantee of the republican form of government accepted, we come now to the question of what such form of government is—what is a distinct republican state?" and we do not have to hunt long or travel far for the definition.

The makers of the Federal Constitution, the men who drafted it, and those who formulated and enacted the Ordinance of 1787 and the Virginia Acts of Cession, had a clear and well-defined understanding of the meaning of the phrase "republican form of government." It was:

> A government in which the supreme power resides in the whole body of the people and is exercised by representatives elected by them.
>
> Webster's Argument in *Luther v. Borden*, Vol. 6, Webster's Works, 216;
> Chief Justice Fuller, *In re Duncan*, 139 U. S., page 461;
> *Downes v. Bidwell*, 182 U. S. 279.

John Jay defined an American State as understood when he wrote in the Constitution of the State of New York:

"The supreme legislative power within this State shall be vested in two separate and distinct bodies * * * who together shall form the Legislature * * *."

5 Thorpe, 2623.

The whole people cannot be the Executive, nor the Supreme Court, nor the Legislature in a republican State.

A distinct republican state government means now what it meant to the Legislature of Virginia and the people of the United States in 1783, when the cession was made to, and accepted by, the United States; when the Ordinance of 1787 was made; when the Federal Constitution was adopted, and when the Enabling Act of 1816 was passed; followed by the ordinance of this State.

Virginia Act of Cession, R. S. 1843, pages 16, 18;
Deed, Dillon's Colonial Legislation, page 357;
Ordinance of July 13, 1787, R. S. 1843, page 20;
Indiana Enabling Act, April 19, 1816, R. S. 1843, page 33;
Ordinance of Indiana, June 29, 1816, R. S. 1843, page 37;
Ohio Enabling Act, April 30, 1802;
Illinois Enabling Act, April 18, 1818.

"The meaning of (every) constitution (and ordinance and statute) is fixedwhen it is adopted, and it is not different at any subsequent time, when a court has occasion to pass upon it." It always means "the intent of the people in adopting it."

Cooley's Constitutional Limitations, 7th Ed., page 89, *et seq.*, and notes.

James Madison said it was:

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and

we shall comprehend both the nature of the cure and efficacy which it must derive from the Union.

The two great points of difference between a democracy and a republic are, first, the delegation of the government in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves, convened for the purpose.

* * * * * * * * * * * * * *

The true distinction between these forms (Republic and Democracy) was also adverted to on a former occasion. It is, that in a democracy, the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents. A democracy, consequently, must be confined to a small spot; a republic may be extended over a large region.

James Madison—Article 10 in the Federalist.

Daniel Webster believed it to be:

A Government in which the supreme power resides in the whole body of the people and is exercised by representatives elected by them.

Webster's Argument in *Luther v. Borden*, Vol. 6 Webster's Works, 216;

Chief Justice Fuller, In re Duncan, 139 U. S. 461;

Downes v. Bidwell, 182 U. S. 279.

A distinct republican state government must be one which is agreeable to the legislature of Virginia and the people of the United States in [illegible], when the oath was made and accepted by the United States; when the ordinance of [illegible] was made; when the Federal Constitution was adopted; when the Enabling Act of [illegible] was passed; when Watson spoke in the case in *Luther v. Borden*, supra; when it meant when ohio framed and adopted a constitution vesting all legislative power in a General Assembly composed of two bodies, House and Senate.

In each and every one of the cases above mentioned a republican state means a government with a legislative department consisting of representatives elected by the people in which, under the constitution, are vested the supreme legislative powers of the state.

1. Virginia Constitution, [illegible], 6 Thorpe 3813 at seq.;
2. New York Constitution, [illegible], 5 Thorpe 2627 at seq.;
3. North Carolina Constitution, [illegible], 5 Thorpe 2795, at seq.;
4. Massachusetts Constitution, [illegible], 3 Thorpe 1889 at seq.;
5. New Hampshire Constitution, [illegible], 4 Thorpe 2455, at seq.;
6. South Carolina Constitution, [illegible], 6 Thorpe 3245, at seq.;
7. Georgia Constitution, [illegible], 2 Thorpe 781 at seq.;
8. Delaware Constitution, [illegible], 1 Thorpe 561 at seq.;
9. Pennsylvania Constitution, [illegible], 5 Thorpe 3083, at seq.;
10. New Jersey Constitution, [illegible], 5 Thorpe 2591, at seq.;
11. Maryland Constitution, [illegible], 3 Thorpe 1687 at seq.

> The charters of Connecticut, 1 Thorpe 529, and Rhode Island, 6 Thorpe, 3211, gave the same form of government, and by common consent remained their constitutions until 1818 and 1842.

The incorporation of provisions for the initiative and referendum into the Ohio Constitution imposed the republican form of government in the state of Ohio and transformed the state from "a distinct republican state" into a quasi democracy where laws are made and enacted not by representative legislative authority, but by the people in mass.

Such a government is not "a distinct republican state" within the meaning and true intent of the term. Provisions and Ordinances above mentioned and established and maintained in Ohio for more than a hundred years.

While still retaining a clause vesting the exclusive legislative power in a general assembly consisting of a Senate and House of Representatives, the state has added to that provision the following:

(Section 1, Article II, Constitution of Ohio, Page 8 Throp Ohio General Code, Volume 1, Page 100.)

Section 1. The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives, but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section or item of any law passed by the general assembly appropriating money, except as hereinafter provided, and independent of the general assembly to propose amendments to the constitution

and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws. (As amended September 28th, 1911).

Section 1a. The first aforesaid power reserved by the people is designated the initiative and the signatures of ten percentum of the electors shall be required upon a petition to propose an amendment to the constitution. When a petition signed by the aforesaid required number of electors, shall have been filed with the Secretary of State, and verified as herein provided, proposing an amendment to the constitution, the full text of which shall have been set forth in such petition, the Secretary of State shall submit for the approval or rejection of the electors, the proposed amendment, in the manner here-inafter provided, at the next succeeding regular or general election in any year occurring subsequent to ninety days after the filing of such petition. The initiative petitions, above described, shall have printed across the top thereof: "Amendment to the Constitution proposed by initiative petition to be submitted directly to the electors." (Adopted September 8, 1912.)

Both the initiative and referendum are in addition to the forms of representative form of government. Expressions by the people directly in the principles upon which the republic is founded. Direct legislation is democracy, as opposed to that form of government with which these powers conflict which is more in the form and which is not to be used to undermine.

State legislatures with power unimpaired are a vital feature of our government; the Federal Constitution presupposes their existence and imposes upon each state the obligation to maintain them. The division of powers of the three departments in each of the states is a prerequisite to the national government.

State legislatures are under the Constitution the agency to carry on the relations between the state and the nation.

The word "legislature" in the Constitution means a representative assembly consisting of two houses empowered to make the law. Such was its meaning at the time of the adoption of the Constitution and such must be its meaning now.

For these reasons the referendum provisions in the constitution of Ohio are illegal and void and the referendum election proposed to be held under them on the action of the legislature in ratifying the pending amendment to the Constitution is without warrant of law and should be enjoined.

For the reasons set forth and cited in the foregoing brief of argument, the plaintiff in error prays the judgment of the Court below may be reversed.

And he now abides the judgment of this Honorable Court.

[illegible]
Indianapolis, Indiana.
[illegible]
Cincinnati, Ohio.
[illegible]
Washington, D. C.,
Counsel for Plaintiff in Error.

[illegible]
Cincinnati, Ohio.
[illegible]
Indianapolis, Indiana.
[illegible]
Indianapolis, Indiana.
[illegible]
Of Counsel.

APPENDIX A

[illegible]

[illegible]

[illegible]

[illegible] *Plaintiff*,

v.

[illegible] *Defendants*.

Petition for writ of Mandamus filed in the [illegible]

[illegible]

The defendant, Thomas L. Fogus, is the duly elected, qualified and acting Prosecuting Attorney of Hamilton County, Ohio, and was such officer during all the times hereinafter set forth.

That the defendants, H. E. Eikenberry, County Auditor aforesaid; Henry T. Hunt, Sheriff aforesaid, and Thomas L. Fogus, Prosecuting Attorney aforesaid, by virtue of having been duly elected to such offices, respectively, and pursuant to Section 3939-1, of the General Code of Ohio, constitute a board known as the Budget Commissioners of Hamilton County, Ohio, and that by virtue thereof, and of the statutes of Ohio further defining their duties and as such Budget Commissioners, they and the said defendants, H. E. Eikenberry, as County Auditor aforesaid, carry out and enforce the provisions of law affecting the state finances, and are charged with the duty of the administration of the statutes, as Auditor aforesaid, which bound to said officer, and the provisions of the state finances, or the collection affecting the interests of the state.

Said relator further says that the General Assembly of the State of Ohio, during the regular session thereof, which, on the eighth day of April, 1913, duly enacted a law entitled "An Act providing a levy and to make a fund for the purposes provided in the act passed May 29, 1913, entitled "An Act to provide a state highway department, defining the duties thereof, and providing and to the construction and maintenance of highways, and to repeal certain sections of the General Code" approved June 9, 1913, and to repeal certain sections of Volumes 103, 104 of Ohio Laws, pages 388, 389, and for other purposes" which said act was duly approved by the Governor of Ohio on the 10th day of April, 1913, and is in full force and effect.

That by said act of the General Assembly it is provided that for the purposes thereof there shall be levied a tax of one-half of one mill on all the property within the state, to be collected as other taxes are collected, and that the proceeds thereof shall be paid into the state treasury to the credit of the state highway department, to be drawn upon by the Governor on receiving from the director of highways and transportation certificates from other officers

and authorities legally empowered to determine the rates or amounts of taxes to be levied for the various purposes authorized by law, to forthwith proceed to determine the sums to be levied upon such part and lot of real property, and upon the amount of personal property, moneys and credits listed in said County of Hamilton.

That among the other taxes to be included with said rates is the taxes provided for in said act of the General Assembly amounting to one-half of one mill on all the taxable property therein; that the same is required by law to be included within the annual budget and estimate prepared by the County Auditor, and said budget and estimate shall be laid before the defendants, the Budget Commissioners of Hamilton County, for their examination, and to ascertain the total amount proposed to be raised in said county for taxable purposes, and to perform certain other duties in connection with such budget and estimate as are required by law, and the provisions of which therefore apply to the said defendants.

The relator says, that said defendant, County Auditor aforesaid, laid said estimate before said defendants, the Budget Commissioners of Hamilton County, who considered the same and allowed all sums certified to said Auditor and except the half mill provided by said Act law, and said Budget Commissioners refused to include said mill or any part thereof within said Budget and have ever since refused to include therein or to allow the same or any part thereof.

That said Budget Commissioners have certified to said defendant, County Auditor, the amounts allowed for state and county purposes, without including therein the one-half mill provided by said law.

That the said relator, as Auditor of State, has performed all duties in connection therewith as required by law to be performed by him as such officer, and has so stated and directed said defendants to observe the provisions of said law, and to add to said county budget and estimate the amount of one-half of one mill in addition to all other levies made for any purpose or purposes, as required by said act of the General Assembly, but the said defendants and each of them, as such officers, have refused to observe and obey such instructions,

and have refused to include within said county budget and estimate said amount of one-half of one mill, for the purposes of said act of the General Assembly, and to perform any other duty in connection therewith, the said defendants and each of them alleging as a reason for such refusal that said act is unconstitutional, null and void.

Wherefore, this relator prays that a writ of mandamus may issue against the said defendant, E. E. Edmundson, as County Auditor aforesaid, and against said defendants, E. E. Edmundson, County Auditor; Henry T. Hunt, Mayor, and Thomas L. Pogue, Prosecuting Attorney, as the Budget Commissioners in and for Hamilton County, Ohio, commanding them, and each of them, forthwith to obey the instructions of the relator as Auditor of State aforesaid, and to add to the county budget and estimate of Hamilton County, aforesaid, the amount of one-half of one mill, for the purposes of said act, in addition to all other levies made for any purpose or purposes and to do and perform all other things and direct upon them and each of them in respect to the levying and collection of said tax, as is required by said act of the General Assembly, and for all proper relief.

THOMAS S. HOGAN,
Prosecuting Attorney of Ohio.

APPENDIX B.

Ohio Enabling Act, April 30, 1802.

1 U. S. Statutes at Large, Volume 2, Page 173.

CHAPTER XLI. AN ACT TO ENABLE THE PEOPLE OF THE EASTERN DIVISION OF THE TERRITORY NORTHWEST OF THE RIVER OHIO TO FORM A CONSTITUTION AND STATE GOVERNMENT, AND FOR THE ADMISSION OF SUCH STATE INTO THE UNION, ON AN EQUAL FOOTING WITH THE ORIGINAL STATES, AND FOR OTHER PURPOSES.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, THAT THE INHABITANTS OF THE EASTERN DIVISION OF THE TERRITORY NORTHWEST OF THE RIVER OHIO, BE AND THEY

are hereby authorized to form for themselves a constitution and state government, and to assume such name as they shall deem proper, and the said state, when formed, shall be admitted to the Union, upon the same footing with the original states, in all respects whatever.

* * *

Section 3. And be it further enacted, That the members of the convention, when duly elected, be and they are hereby authorized to meet at Chillicothe on the first Monday in November next; which convention, when met, shall first determine by a majority of the whole number elected, whether it be or be not expedient at that time to form a constitution and state government for the people within the said territory, and if it be determined to be expedient, the convention shall be, and hereby are, authorized to form a constitution and state government, or if it be deemed more expedient, the said convention shall provide by ordinance for electing representatives to form a constitution or frame a government, which said representatives shall be chosen in such manner, and in such proportion, and shall meet at such time and place, as shall be prescribed by the said ordinance, and shall form for the people of the said state, a constitution and state government; PROVIDED THE SAME SHALL BE REPUBLICAN, AND NOT REPUGNANT TO THE PROVISIONS of the thirteenth of July, one thousand seven hundred and eighty-seven, between the original states and the people and states of the territory north west of the River Ohio.

APPENDIX C.

Indiana Enabling Act, April 19, 1816.

[3 U. S. Statutes at Large, Private & Resolutions, 289.]

CHAPTER XXII. *An Act to enable the people of the Indiana Territory to form a Constitution and State Government, and for the admission of such state into the Union on an equal footing with the original states.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress as

enabled, That the inhabitants of the Territory of Indiana be and they are hereby authorized to form for themselves a constitution and state government, and to assume such name as they shall deem proper, and the said state, when formed, shall be admitted into the Union upon the same footing with the original states, in all respects whatever. * * *

Section 4. And be it further enacted, That the members of the convention thus duly elected be and they are hereby authorized to meet at the seat of the government of the said territory, on the second Monday of June, next, which convention, when met, shall first determine, by a majority of the whole number elected, whether it be, or be not expedient, at that time, to form a constitution and state government, for the people within the said territory, and if it be determined to be expedient, the convention shall be, and hereby are, authorized to form a constitution and state government; or if it be deemed more expedient, the said convention shall provide by ordinance for electing representatives to form a constitution, or frame of government; which said representatives shall be chosen in such manner and in such proportions, and shall meet at such time and place, as shall be prescribed by said ordinance, and shall then form, for the people of said territory, a constitution and state government, PROVIDED, THAT THE SAME WHEREVER FORMED, SHALL BE REPUBLICAN, AND NOT REPUGNANT TO THESE ARTICLES OF THE ORDINANCE of the 13th of July, one thousand seven hundred and eighty-seven; which are declared irrevocable between the original states and the people and states of the territory Northwest of the River Ohio; excepting so much of said articles as relate to the boundaries of the States therein to be formed."

APPENDIX B.

Illinois Enabling Act, April 18, 1818.

U. S. Statutes at Large, Volume 3, Page 428.

[illegible] LAWS. An Act to enable the people of the Illinois Territory to form a Constitution and State Gov-

ment, and for the admission of such state into the Union on an equal footing with the original states.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the inhabitants of the Territory of Illinois be, and they are hereby, authorized to form for themselves a constitution and state government, and to assume such name as they shall deem proper, and the said state, when formed, shall be admitted into the Union upon the same footing with the original states, in all respects whatever. * * *

Section 4. And be it further enacted, That the members of the convention, thus duly elected, be, and they are hereby, authorized to meet at the seat of the government of the said territory, on the first Monday of the month of August next, which convention, when met, shall first determine, by a majority of the whole number elected, whether it be, or be not, expedient at that time to form a constitution and state government for the people within the said territory, and, if it be expedient, the convention shall be and hereby is authorized to form a constitution and state government, or, if it be deemed more expedient, the said convention shall provide by ordinance for electing representatives to form a constitution or frame of government; which said representatives shall be chosen in such manner, and in such proportion, and shall meet at such time and place, as shall be prescribed by the said ordinance, and shall then form for the people of said territory, a constitution and state government: PROVIDED, THAT THE SAME, WHENEVER FORMED, SHALL BE REPUBLICAN, AND NOT REPUGNANT TO THE ORDINANCE of the thirteenth of July, seventeen hundred and eighty-seven, between the original states and the people and states of the territory northwest of the River Ohio, excepting so much of said articles as relate to the boundaries of the states therein to be formed. And Provided also, That it shall appear, from the communication directed to be made by the legislature of the said territory, that there are, within the proposed state, not less than forty thousand inhabitants

HAMILTON, COLLECTOR OF INTERNAL REVENUE FOR THE COLLECTION DISTRICT OF KENTUCKY, *v.* KENTUCKY DISTILLERIES & WAREHOUSE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

DRYFOOS ET AL. *v.* EDWARDS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND COLLECTION DISTRICT OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 589, 602. Argued November 20, 1919.—Decided December 15, 1919.

The power to prohibit the liquor traffic as a means of increasing war efficiency is part of the war power of Congress, and its exercise without providing for compensation is no more limited by the Fifth Amendment than a like exercise of a State's police power would be limited by the Fourteenth Amendment. P. 154.

The War-Time Prohibition Act, approved ten days after the armistice with Germany was signed, Act of November 21, 1918, c. 212, 40 Stat. 1046, provided: "That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export." *Held*, in respect of liquors in bond, even if belonging to one who made and owned them before the

act was passed and paid revenue taxes upon them since June 30, 1919:

(1) That the act was not an appropriation of such liquors for public purposes. P. 157.

(2) That the time allowed for disposing of all liquors in bond on November 21, 1918, could not be declared unreasonable, as a matter of law, even if they were not sufficiently ripened or aged to be disposed of advantageously during the period limited. P. 158.

(3) That the prohibition was not in violation of the Fifth Amendment as a taking of property without compensation. P. 157.

(4) That it was within the war power when passed (notwithstanding the cessation of hostilities under the armistice), as a means of war efficiency and for the support and care of the Army and Navy during demobilization. P. 158.

A wide latitude of discretion must be accorded to Congress in the exercise of the war powers. P. 163.

The court cannot inquire into the motives of Congress, in determining the validity of its acts, or into the wisdom of the legislation; nor pass upon the necessity for the exercise of a power possessed. P. 161.

It is settled that the war power carries with it the power to guard against immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress. *Id.*

Assuming that the continuing validity of an act passed under the war power may depend not upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or by a proclamation of peace, but upon some actual war emergency or necessity, the court cannot say that the necessity for the prohibition had ceased when these suits were begun, in view of the facts that the treaty of peace has not been concluded, that various war activities,—among them national control of railroads,—continue, and that the man power of the nation has not been completely restored to a peace footing. P. 161.

The Eighteenth Amendment did not operate to repeal the War-Time Prohibition Act. P. 163.

In defining the period of the prohibition, Congress in the War-Time Prohibition Act, doubtless expecting that the war would be definitely ended by a peace under a ratified treaty or a proclamation before demobilization was complete, intended that the prohibition should continue until the date of the termination of demobilization had been definitely ascertained by the President and made known by him through a proclamation to that end. P. 164.

The reference to the "demobilization of the army and navy," in the

President's message communicating his veto of the National Prohibition Act, is not the proclamation required by the War-Time Prohibition Act. P. 167.

In an exact sense, demobilization had not terminated then or when these suits were begun, as is shown by the report on the subject of the Secretary of War, made to the President and transmitted to Congress; nor does it appear that it has yet so terminated. P. 168.

No. 589. Reversed.

No. 602. Affirmed.

THE cases are stated in the opinion.

The Solicitor General and *Mr. Assistant Attorney General Frierson*, with whom *Mr. W. V. Gregory* was on the briefs, for appellant in No. 589 and appellee in No. 602.

Mr. Levy Mayer and *Mr. William Marshall Bullitt* for appellee in No. 589:

Congress has no power to prohibit the sale of whisky within a State, except under its war powers. By the Tenth Amendment the States reserved to themselves the police power over the liquor traffic with the right to abolish future manufacture, sale or possession. This power is absolute and exclusive, since, as before, the Fourteenth Amendment. But it is still an open question whether a State can make unlawful the possession, use or sale of liquors lawfully acquired (as in the present case) before the passage of the prohibitory statute. *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Eberle* v. *Michigan*, 232 U. S. 700, 706; *Barbour* v. *Georgia*, 249 U. S. 454, 459; *Wynehamer* v. *People*, 13 N. Y. 378.

Congress can waive the interstate character of liquor in order to subject it to the laws of a State when once introduced therein, or can prohibit its transportation to a State where its possession is prohibited. *In re Rahrer*, 140 U. S. 545; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 323. But Congress has no power, in peace time, to prohibit the sale of whisky. *In re Rahrer*,

140 U. S. 545, 554; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 667; *Matter of Heff*, 197 U. S. 488, 505; *Hammer* v. *Dagenhart*, 247 U. S. 251, 273–276; *Keller* v. *United States*, 213 U. S. 138, 144, 148.

In order to guard and promote the health, welfare and efficiency of the men composing the army and navy, and to increase the efficiency of the workers in the production of arms, munitions, ships, food and clothing for them, Congress has the right temporarily to regulate the sale of liquor, and, if reasonably necessary to accomplish such objects, to forbid its sale. *McKinley* v. *United States*, 249 U. S. 397, 399; *Selective Draft Law Cases*, 245 U. S. 366; *Schenck* v. *United States*, 249 U. S. 47, 52; *Grancourt* v. *United States*, 258 Fed. Rep. 25; *United States* v. *Casey*, 247 Fed. Rep. 362; *Pappens* v. *United States*, 252 Fed. Rep. 55. But the exercise of this power, like all others, is subject to the Fifth Amendment. *Ex parte Milligan*, 4 Wall. 2; *Johnson* v. *Jones*, 44 Illinois, 142; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336; *McCray* v. *United States*, 195 U. S. 27, 61. It necessarily follows that if, in the exercise of the war power, private property is taken, the owner thereof is entitled to just compensation therefor.

Whisky is property and when taken for public use is entitled to the protection of the Fifth Amendment. *Leisy* v. *Hardin*, 135 U. S. 100, 110; *Wynehamer* v. *People*, 13 N. Y. 378, 383, 384; *Commonwealth* v. *Campbell*, 133 Kentucky, 50; *Barber* v. *Commonwealth*, 182 Kentucky, 200; *Commonwealth* v. *Kentucky Distilleries & Warehouse Co.*, 143 Kentucky, 314.

The War-Time Prohibition Act takes appellee's private property for public use, but makes no provision for just compensation to the owner. Therefore, the act is unconstitutional. The act prohibits appellee from either selling the whisky which it has in its own possession fully tax paid, or obtaining possession of its property which is in

the Government's bonded warehouses. The effect is that the appellee has been deprived of every attribute of ownership, except the necessity of paying taxes to the United States upon the very property which the Government refuses to allow the owner to use or sell. If this does not constitute a taking of a person's property, the English language has lost its meaning. *Buchanan* v. *Warley*, 245 U. S. 60, 74, 81; *Wynehamer* v. *People*, 13 N. Y. 387, 389, 396, 398; *Foster* v. *Scott*, 136 N. Y. 577; *United States* v. *Cress*, 243 U. S. 316; *United States* v. *Lynah*, 188 U. S. 445. The appellee was required by the federal statute to provide, at its own expense, bonded warehouses, which were under the exclusive control of the Government. *Taney* v. *Penn National Bank*, 232 U. S. 174; *Dale* v. *Pattison*, 234 U. S. 399. By statute, it was also authorized to leave its whisky in bond for eight years, and to bottle it in bond at any time after the first four years. The whisky in question was rightfully in appellee's bonded warehouses and it had the right to rely upon the "bottling in bond statute," and furthermore it could not have bottled a large part of the whisky because it had not been in the warehouses four years at the time the War Prohibition Act was enacted. It is therefore no answer to suggest that the appellee should have withdrawn the whisky from bond and sold the same before the War Prohibition Act was enacted. As the taking is solely under the war power, it is concededly for a public use. No provision for any compensation was made; but, on the contrary, Congress (February 24, 1919) imposed a heavy retroactive tax (double the then existing tax) on all whisky, including that already tax-paid; the tax was assessed and collected; and the owners are now prohibited from selling the very whisky on which they have paid that tax, a large part of which the appellee was compelled to pay as late as September 24, 1919. It is a false analogy to say that under the war power Congress is endowed with what are commonly

called the police powers of the States and consequently may exercise them as unlimitedly as do the States. For the police powers of the States are not subject to the Fifth Amendment, whereas the war powers of Congress are. It has not been decided that even the state police powers may prohibit sale of liquor made before the passage of the law. While it is true that Congress' exercise of the war power can accomplish anything which the States can accomplish under their police power, yet the qualifications imposed thereon are different. It may not, for instance, require excessive bail, refuse a public trial in a criminal case, or cause the accused to be a witness against himself. The instances might be multiplied where States are free in the exercise of their police powers, from requirements to which Congress, even in the exercise of its war power, is subject. The law is abundantly settled that while the Fifth Amendment does not require that the just compensation shall be actually paid in advance of the taking, nevertheless, the owner is entitled to some reasonable, certain and adequate provision for obtaining such compensation before his ownership or possession can be interfered with.

The War-Time Prohibition Act has, by its own terms, ceased to be operative. The evil sought to be remedied was the danger of intoxication of soldiers, sailors and war workers during the war and during the subsequent period of demobilization. Cong. Rec., vol. 56, pp. 9627, 9641. Demobilization is the act of disbanding troops; the reduction of military armaments to a peace footing. Century Dictionary; 18 Corpus Juris, 484; Cong. Rec., *loc. cit.*

The President's acts and declarations amount to a proclamation of "the date of the conclusion of the present war," in the sense of actual hostilities, and *thereafter* the "termination of demobilization." [Counsel quoted also statements made by the War Department and by General Pershing, to the effect that demobilization was at an end.]

The demobilization process has continued steadily until the strength of both the army and navy has been reduced to less than the authorized peace quota. The production of war munitions has stopped, all existing contracts have been canceled and the Government is actively disposing of its surplus war supplies of arms, munitions, food and clothing, etc.

What is meant by "conclusion of the present war" must be determined by the purpose of this particular act, and the evident belief of Congress that the ending of the war would precede demobilization. Cases like *Hijo* v. *United States*, 194 U. S. 315, holding war existent until ratification of peace, are inapplicable. That Congress purposely did not intend to make the "conclusion of the present war" dependent upon any treaty of peace is illustrated by a comparison of the language of this act with that of other war legislation wherein the "end of the war" was involved.

A foreign war may not be terminated in respect of various considerations arising under international law and yet be concluded in respect of the rights and duties of citizens of the United States under the Federal Constitution; and it does not follow that because a technical state of war still prevails between the United States, Germany and Austria, notwithstanding the complete demobilization of our army and navy, the constitutional rights of the citizens of the United States are to be tested as if war actually existed. It is not necessary that there should ever be a definite treaty of peace. History presents many instances where there has been a "conclusion of war" without any treaty of peace. Whether or not war has been terminated is, after all, a question of fact to be determined in each case by the situation presented.

The War-time Prohibition Act has become obsolete with the passing of the emergency [citing various rate cases, and the *Perrin* and *Gearlds Case*, which are considered in the court's opinion, *infra*, 162].

Mr. Walter C. Noyes, with whom *Mr. Moses J. Stroock*, *Mr. Arthur L. Strasser* and *Mr. Walter S. Dryfoos* were on the brief, for appellants in No. 602.

Mr. Wayne B. Wheeler and *Mr. R. C. Minton*, by leave of court, filed a brief as *amici curiæ* in No. 589.

Mr. Levi Cooke and *Mr. George R. Benneman*, by leave of court, filed a brief as *amici curiæ* in No. 602.

Mr. Justice Brandeis delivered the opinion of the court.

The armistice with Germany was signed November 11, 1918. Thereafter Congress passed and, on November 21, 1918, the President approved the War-Time Prohibition Act (c. 212, 40 Stat. 1045, 1046), which provides as follows:

"That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. . . ."

On October 10, 1919, the Kentucky Distilleries and Warehouse Company, owner of distillery warehouses and of whisky therein, brought in the District Court of the United States for the Western District of Kentucky a suit against Hamilton, Collector of Internal Revenue for that District, alleging that the above act was void or had become inoperative and praying that he be enjoined from interfering, by reason of that act, with the usual process of

withdrawal, distribution and sale of the whisky in bond. The case was heard before the District Judge on plaintiff's motion for a preliminary injunction and defendant's motion to dismiss. A decision without opinion was rendered for the plaintiff; and, the defendant declining to plead further, a final decree was entered granting a permanent injunction in accordance with the prayer of the bill. A similar suit seeking like relief was brought on October 29, 1919, by Dryfoos, Blum & Co., in the District Court of the United States for the Southern District of New York, against Edwards, Collector for that District. That case was heard on November 5 before the District Judge on like motions for a preliminary injunction and to dismiss. An opinion was filed November 14, 1919, holding the act in force; and on the following day a final decree was entered dismissing the bill.

The essential facts in the two cases differ in this: In the Kentucky case the whisky was stored in a distillery warehouse; the plaintiff was the maker of the whisky; had owned it prior to the passage of the act; and had, since June 30, 1919, paid the revenue tax on part of it. In the New York case the liquors were in general and special bonded warehouses; the plaintiffs were jobbers; and it does not appear when they became the owners of the liquors. Both cases come here by direct appeal under § 238 of the Judicial Code, were argued on the same day, and may be disposed of together. Four contentions are made in support of the relief prayed for: (1) that the act was void when enacted because it violated the Fifth Amendment; (2) that it became void before these suits were brought by reason of the passing of the war emergency; (3) that it was abrogated or repealed by the Eighteenth Amendment; (4) that by its own terms it expired before the commencement of these suits. These contentions will be considered in their order.

First: Is the act void because it takes private property

for public purposes without compensation in violation of the Fifth Amendment? The contention is this: The Constitution did not confer police power upon Congress. Its power to regulate the liquor traffic must therefore be sought for in the implied war powers; that is, the power "to make all laws which shall be necessary and proper for carrying into execution" the war powers expressly granted. Article I, § 8, clause 18. Congress might under this implied power temporarily regulate the sale of liquor and, if reasonably necessary, forbid its sale in order to guard and promote the efficiency of the men composing the army and the navy and of the workers engaged in supplying them with arms, munitions, transportation and supplies. *McKinley* v. *United States*, 249 U. S. 397, 399. But the exercise of the war powers is (except in respect to property destroyed by military operations, *United States* v. *Pacific Railroad*, 120 U. S. 227, 239) subject to the Fifth Amendment. *United States* v. *Russell*, 13 Wall. 623, 627. The severe restriction imposed by the act upon the disposition of liquors amounts to a taking of property; and being uncompensated would, at least as applied to liquors acquired before the passage of the act, exceed even the restriction held to be admissible under the broad police powers possessed by the States. Therefore, since it fails to make provision for compensation, which in every other instance Congress made when authorizing the taking or use of property for war purposes,[1] it is void. Such is the argument of the plaintiffs below.

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[1] War Acts authorizing the seizure or requisition of property:

March 4, 1917, c. 180, 39 Stat. 1168, 1193, July 1, 1918, c. 113, 40 Stat. 634, 651, factories, ships, and war materials; June 15, 1917, c. 29, 40 Stat. 182, 183, April 22, 1918, c. 62, 40 Stat. 535, November 4, 1918, c. 201, 40 Stat. 1020, street railroads, equipment, etc., and the acquisition of title to lands, plants, etc.; August 10, 1917, c. 53, 40 Stat. 276, 279 (Food Control Act), foods, fuels, factories, packing

That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose. *Lottery Case*, 188 U. S. 321, 357; *McCray* v. *United States*, 195 U. S. 27; *Hipolite Egg Co.* v. *United States*, 220 U. S. 45, 58; *Hoke* v. *United States*, 227 U. S. 308, 323; *Seven Cases* v. *United States*, 239 U. S. 510, 515; *United States* v. *Doremus*, 249 U. S. 86, 93-94. The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations (*Ex parte Milligan*, 4 Wall. 2, 121-127; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505, 571; *McCray* v. *United States*, 195 U. S. 27, 61; *United States* v. *Cress*, 243 U. S. 316, 326); but the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power. *In re Kemmler*, 136 U. S. 436, 448; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 410. If the nature and conditions of a restric-

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houses, coal mines, coal supplies, etc.; March 21, 1918, c. 25, 40 Stat. 451, railroads; May 16, 1918, c. 74, 40 Stat. 550, 551, June 4, 1918, c. 92, 40 Stat. 594, houses, buildings, properties, etc., in District of Columbia; July 18, 1918, c. 157, 40 Stat. 913, 915, ships; July 16, 1918, c. 154, 40 Stat. 904, telephone and telegraph systems; October 5, 1918, c. 181, 40 Stat. 1009, 1010, mines, mineral lands, etc.

See also Act of June 3, 1916, c. 134 (39 Stat. 166, 213), for the mobilization of industries, which authorizes the seizure of munition plants and provides that the compensation therefor shall be "fair and just," and the Act of March 4, 1917, c. 180, 39 Stat. 1168, 1169, authorizing the acquisition of aëroplane patents by condemnation, for which $1,000,000 was appropriated.

tion upon the use or disposition of property is such that a State could, under the police power, impose it consistently with the Fourteenth Amendment without making compensation, then the United States may for a permitted purpose impose a like restriction consistently with the Fifth Amendment without making compensation; for prohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency.

There was no appropriation of the liquor for public purposes. The War-Time Prohibition Act fixed a period of seven months and nine days from its passage during which liquors could be disposed of free from any restriction imposed by the Federal Government. Thereafter, until the end of the war and the termination of demobilization, it permits an unrestricted sale for export and, within the United States, sales for other than beverage purposes. The uncompensated restriction upon the disposition of liquors imposed by this act is of a nature far less severe than the restrictions upon the use of property acquired before the enactment of the prohibitory law which were held to be permissible in cases arising under the Fourteenth Amendment. *Mugler* v. *Kansas*, 123 U. S. 623, 668; *Kidd* v. *Pearson*, 128 U. S. 1, 23. The question whether an absolute prohibition of sale could be applied by a State to liquor acquired before the enactment of the prohibitory law has been raised by this court but not answered, because unnecessary to a decision. *Bartemeyer* v. *Iowa*, 18 Wall. 129, 133; *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 32-33; *Eberle* v. *Michigan*, 232 U. S. 700, 706; *Barbour* v. *Georgia*, 249 U. S. 454, 459. See, however, *Mugler* v. *Kansas*, *supra*, pp. 623, 625, 657. But no reason appears why a state statute, which postpones its effective date long enough to enable those engaged in the business to dispose of stocks on hand at the date of its enactment, should be obnoxious to the Fourteenth Amendment; or why such a federal law should be ob-

noxious to the Fifth Amendment. We cannot say that seven months and nine days was not a reasonable time within which to dispose of all liquors in bonded warehouses on November 21, 1918. The amount then in storage was materially less than was usually carried;[1] because no such liquor could be lawfully made in America under the Lever Food and Fuel Control Act (August 10, 1917, c. 53, § 15, 40 Stat. 276, 282) after September 9, 1917. And if, as is suggested, the liquors remaining in bond November 21, 1918, were not yet sufficiently ripened or aged to permit them to be advantageously disposed of within the limited period of seven months and nine days thereafter, the resulting inconvenience to the owner, attributable to the inherent qualities of the property itself, cannot be regarded as a taking of property in the constitutional sense. *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 332.

Second: Did the act become void by the passing of the war emergency before the commencement of these suits? It is conceded that the mere cessation of hostilities under the armistice did not abridge or suspend the power of Congress to resort to prohibition of the liquor traffic

[1] The amount of distilled spirits of all kinds in bonded warehouses June 30, 1919, was 72,358,151.1 gallons as compared with 282,036,460.2, June 30, 1914; 253,668,341.3 gallons, June 30, 1915; 232,402,878.3 gallons, June 30, 1916; 194,832,682.6 gallons, June 30, 1917; 158,959,264.5 gallons, June 30, 1918. Report of the Commissioner of Internal Revenue for 1919, p. 173. The following explanation is given by the Commissioner, p. 51, why more was not withdrawn: "The high rates of tax on spirits, fermented liquors and wines which were provided in the bill subsequently enacted into law as the Revenue Act of 1918, prompted many dealers to make heavy purchases of these commodities prior to the passage of the Act and, as a consequence of this action on the part of the dealers as well as of the expansion of prohibition territory throughout the United States the withdrawals from bonded warehouses materially declined after the passage of the Act."

as a means of increasing our war efficiency; that the support and care of the army and navy during demobilization was within the war emergency; and that, hence, the act was valid when passed. The contention is that between the date of its enactment and the commencement of these suits it had become evident that hostilities would not be resumed; that demobilization had been effected; that thereby the war emergency was removed; and that when the emergency ceased the statute became void.

To establish that the emergency has passed, statements and acts of the President and of other executive officers are adduced; some of them antedating the enactment of the statute here in question. There are statements of the President to the effect that the war has ended [1] and peace has come; [2] that certain war agencies and activities should be discontinued; [3] that our enemies are impotent to renew hostilities [4] and that the objects of the act here in question have been satisfied in the demobilization of the army and navy.[5] It is shown that many war-time activities have been suspended; that vast quantities of war materials have been disposed of; that trade with Germany has been resumed; and that the censorship of postal, telegraphic and wire communications has been removed.[6] But we have also the fact that since these statements were made and these acts

[1] Address to Congress, Official U. S. Bulletin, Nov. 11, 1918, p. 5.

[2] Thanksgiving Proclamation, Official U. S. Bulletin, Nov. 18, 1918, p. 1.

[3] Address to Congress, Dec. 2, 1918, Official U. S. Bulletin, Dec. 2, 1918, p. 6.

[4] Armistice Commemoration Proclamation, Nov. 11, 1919.

[5] Veto Message, October 27, 1919, Congressional Record, Oct. 27, 1919, p. 8063.

[6] U. S. Official Bulletin, Nov. 12, 1918, p. 3; Nov. 22, 1918, p. 1; Nov. 27, 1918, p. 7; Dec. 12, 1918, p. 4; Dec. 20, 1918, p. 4; Dec. 30, 1918, p. 7; United States Bulletin, Feb. 27, 1919, p. 6; May 8, 1919; May 12, 1919, p. 14; Oct. 20, 1919, p. 17.

were done, Congress, on October 28, 1919, passed over the President's veto the National Prohibition Act which, in making further provision for the administration of the War-Time Prohibition Act, treats the war as continuing and demobilization as incomplete; that the Senate, on November 19, 1919, refused to ratify the Treaty of Peace with Germany;[1] that under the provisions of the Lever Act the President resumed, on October 30, 1919, the control of the fuel supply which he had relinquished partly on January 31, 1919, and partly on February 20, 1919;[2] that he is still operating the railroads of which control had been taken as a war measure; and that on November 18, 1919, he vetoed Senate Bill 641, because it diminished that control;[3] that pursuant to the Act of March 4, 1919, c. 125, 40 Stat. 1348, he continues to control, by means of the Food Administration Grain Corporation, the supply of grain and wheat flour; that through the United States Sugar Equalization Board, Inc., he still regulates the price of sugar; that in his message to Congress on December 2, 1919, he urgently recommended the further extension for six months of the powers of the Food Administration; that as commander-in-chief he still keeps a part of the army in enemy occupied territory and another part in Siberia; and that he has refrained from issuing the proclamation declaring the termination of demobilization for which this act provides.

The present contention may be stated thus: That notwithstanding the act was a proper exercise of the war power of Congress at the date of its approval and contains its own period of limitation—"until the conclusion of the present war and thereafter until the termination of demob-

[1] Congressional Record, Nov. 19, 1919, p. 9321.

[2] United States Bulletin, Nov. 10, 1919, p. 9; U. S. Official Bulletin, Jan. 18, 1919, p. 1.

[3] Congressional Record, Nov. 19, 1919, p. 9323.

ilization,"—the progress of events since that time had produced so great a change of conditions and there now is so clearly a want of necessity for conserving the man power of the nation, for increased efficiency in the production of arms, munitions and supplies, that the prohibition of the sale of distilled spirits for beverage purposes can no longer be enforced, because it would be beyond the constitutional authority of Congress in the exercise of the war power to impose such a prohibition under present circumstances. Assuming that the implied power to enact such a prohibition must depend not upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or a proclamation of peace (*United States* v. *Anderson*, 9 Wall. 56, 70; *The Protector*, 12 Wall. 700, 702; *Hijo* v. *United States*, 194 U. S. 315, 323,) but upon some actual emergency or necessity arising out of the war or incident to it, still, as was said in *Stewart* v. *Kahn*, 11 Wall. 493, 507, "The power is not limited to victories in the field and the dispersion of the [insurgent] forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."

No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, enquire into the motives of Congress. *United States* v. *Des Moines Navigation Co.*, 142 U. S. 510, 544; *McCray* v. *United States*, 195 U. S. 27, 53–59; *Weber* v. *Freed*, 239 U. S. 325, 330; *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 163, 184. Nor may the court enquire into the wisdom of the legislation. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421; *Gibbons* v. *Ogden*, 9 Wheat. 1, 197; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 25; *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357. Nor may it pass upon the necessity for the exercise of a power possessed, since the possible abuse of a

power is not an argument against its existence. *Lottery Case*, 188 U. S. 321, 363.

That a statute valid when enacted may cease to have validity owing to a change of circumstances has been recognized, with respect to state laws, in several rate cases. *Minnesota Rate Cases*, 230 U. S. 352, 473; *Missouri Rate Cases*, 230 U. S. 474, 508; *Lincoln Gas Co.* v. *Lincoln*, 250 U. S. 256, 268. That the doctrine is applicable to acts of Congress was conceded *arguendo* in *Perrin* v. *United States*, 232 U. S. 478, 486; and *Johnson* v. *Gearlds*, 234 U. S. 422, 446. In each of these cases Congress had prohibited the introduction of liquor into lands inhabited by Indians, without specified limit of time; in one case the prohibition was in terms perpetual; in the other it was to continue "until otherwise provided by Congress." In both cases it was contended that the constitutional power of Congress over the subject-matter necessarily was limited to what was reasonably essential to the protection of the Indians. In the *Perrin Case* it was contended (p. 482) that the power was transcended because the prohibition embraced territory greatly in excess of what the situation reasonably required, and because its operation was not confined to a designated period reasonable in duration but apparently was intended to be perpetual. In *Johnson* v. *Gearlds* the contention was (p. 442) that a prohibition originally valid had become obsolete by reason of changes in the character of the territory included in it and the status of the Indians therein. In both cases the court, while assuming that since the power to impose a prohibition of this character was incident to the presence of the Indians and their status as wards of the Government and did not extend beyond what was reasonably essential to their protection, it followed that a prohibition valid in the beginning would become inoperative when in regular course the Indians affected were completely emancipated from federal guardianship and con-

trol, nevertheless held that the courts would not be justified in declaring that the restriction either was originally invalid or had become obsolete if any considerable number of Indians remained wards of the Government within the prohibited territory. In each case the decision rested upon the ground that the question what was reasonably essential to the protection of the Indians was one primarily for the consideration of the law-making body; that Congress was invested with a wide discretion; and that its action, unless purely arbitrary, must be accepted and given full effect by the courts.

Conceding, then, for the purposes of the present case, that the question of the continued validity of the war prohibition act under the changed circumstances depends upon whether it appears that there is no longer any necessity for the prohibition of the sale of distilled spirits for beverage purposes, it remains to be said that on obvious grounds every reasonable intendment must be made in favor of its continuing validity, the prescribed period of limitation not having arrived; that to Congress in the exercise of its powers, not least the war power upon which the very life of the nation depends, a wide latitude of discretion must be accorded; and that it would require a clear case to justify a court in declaring that such an act, passed for such a purpose, had ceased to have force because the power of Congress no longer continued. In view of facts of public knowledge, some of which have been referred to, that the treaty of peace has not yet been concluded, that the railways are still under national control by virtue of the war powers, that other war activities have not been brought to a close, and that it can not even be said that the man power of the nation has been restored to a peace footing, we are unable to conclude that the act has ceased to be valid.

Third: Was the act repealed by the adoption of the Eighteenth Amendment? By the express terms of the

Amendment the prohibition thereby imposed becomes effective after one year from its ratification. Ratification was proclaimed on January 29, 1919, 40 Stat. 1941. The contention is that, as the Amendment became on its adoption an integral part of the Constitution, its implications are as binding as its language; that in postponing the effective date of the prohibition the Amendment impliedly guaranteed to manufacturers and dealers in intoxicating liquors a year of grace; and that not only was Congress prohibited thereby from enacting meanwhile new prohibitory legislation, but also that the then existing restriction imposed by the War-Time Prohibition Act was removed. See *Narragansett Brewing Co.* v. *Baker and O'Shaunessy*, U. S. D. Ct. R. I., November 12, 1919.

The Eighteenth Amendment with its implications, if any, is binding not only in times of peace, but in war. If there be found by implication a denial to Congress of the right to forbid before its effective date any prohibition of the liquor traffic, that denial must have been operative immediately upon the adoption of the Amendment, although at that time demobilization of the army and the navy was far from complete. If the Amendment effected such a denial of power then it would have done so equally had hostilities continued flagrant or been renewed. Furthermore, the Amendment is binding alike upon the United States and the individual States. If it guarantees a year of immunity from interference by the Federal Government with the liquor traffic, even to the extent of abrogating restrictions existing at the time of its adoption, it is difficult to see why the guaranty does not extend also to immunity from interference by the individual States, with like results also as to then existing state legislation. The contention is clearly unsound.

Fourth: Did the prohibition imposed by the act expire by limitation before the commencement of these suits? The period therein prescribed is "until the conclusion of

the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States." It is contended both that the war has been concluded and that the demobilization has terminated.

In the absence of specific provisions to the contrary the period of war has been held to extend to the ratification of the treaty of peace or the proclamation of peace. *Hijo* v. *United States*, 194 U. S. 315, 323; *The Protector*, 12 Wall. 700, 702; *United States* v. *Anderson*, 9 Wall. 56, 70. From the fact that other statutes concerning war activities contain each a specific provision for determining when it shall cease to be operative,[1] and from the alleged absence of

[1] The provisions fixing the date of expiration of the several war acts are as follows:

(Aircraft Act being c. XVI, of the Army Appropriation Act of July 9, 1918, c. 143, 40 Stat. 889.) "Within one year from the signing of a treaty of peace with the Imperial German Government."

(Departmental Reorganization Act of May 20, 1918, c. 78, 40 Stat. 556.) "That this Act shall remain in force during the continuance of the present war and for six months after the termination of the war by the proclamation of the treaty of peace."

(Emergency Shipping Fund Act of June 15, 1917, c. 29, 40 Stat. 182, as amended by the Act of April 22, 1918, c. 62, 40 Stat. 535, and by the Act of November 4, 1918, c. 201, 40 Stat. 1020.) "All authority . . . shall cease six months after a final treaty of peace is proclaimed between this Government and the German Empire."

(Charter Rate and Requisition Act of July 18, 1918, c. 157, 40 Stat. 913.) "All power and authority . . . shall cease upon the proclamation of the final treaty of peace between the United States and the Imperial German Government."

(Railroad Control Act of March 21, 1918, c. 25, 40 Stat. 451, 458.) ". . . Federal control . . . shall continue for and during the period of the war and for a reasonable time thereafter, which shall not exceed one year and nine months next following the date of the proclamation by the President of the exchange of ratifications of the treaty of peace."

(Food Control Act of August 10, 1917, c. 53, 40 Stat. 276, 283.) "Sec. 24. That the provisions of this Act shall cease to be in effect

such a provision here, it is argued that the term "conclusion of the war" should not be given its ordinary legal meaning; that instead it should be construed as the time when actual hostilities ceased; or when the treaty of peace was signed at Versailles, on June 28, 1919, by the American and German representatives; or, more generally, when the actual war emergencies ceased by reason of our complete victory and the disarmament of the enemy coupled with the demobilization of our army and the closing of war activities; or when the declared purpose of the act of "conserving the man power of the Nation, and to increase

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when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President."

(Trading with the Enemy Act of October 6, 1917, c. 106, 40 Stat. 411, 412.) "The words 'end of the war' as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the 'end of the war' within the meaning of this Act."

(Soldiers' and Sailors' Civil Relief Act of March 8, 1918, c. 20, 40 Stat. 440, at 441 and 449.) "(5) The term 'termination of the war' as used in this Act shall mean the termination of the present war by the treaty of peace as proclaimed by the President. . . . Sec. 603. That this Act shall remain in force until the termination of the war, and for six months thereafter."

(Saulsbury Resolution of May 31, 1918, c. 90, 40 Stat. 593.) "That until a treaty of peace shall have been definitely concluded between the United States and the Imperial German Government, unless in the meantime otherwise provided by Congress . . ."

(Wheat Price Guarantee Act of March 4, 1919, c. 125, § 11, 40 Stat. 1348, 1353.) "That the provisions of this Act shall cease to be in effect whenever the President shall find that the emergency growing out of the war with Germany has passed and that the further execution of the provisions of this Act is no longer necessary for its purposes, the date of which termination shall be ascertained and proclaimed by the President; but the date when this Act shall cease to be in effect shall not be later than the first day of June, nineteen hundred and twenty."

efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy" shall have been fully satisfied. But there is nothing in the words used to justify such a construction. "Conclusion of the war" clearly did not mean cessation of hostilities; because the act was approved ten days after hostilities had ceased upon the signing of the armistice. Nor may we assume that Congress intended by the phrase to designate the date when the treaty of peace should be signed at Versailles or elsewhere by German and American representatives, since by the Constitution a treaty is only a proposal until approved by the Senate. Furthermore, to construe "conclusion of the war" as meaning the actual termination of war activities, would leave wholly uncertain the date when the act would cease to be operative; whereas Congress evinced here, as in other war statutes, a clear purpose that the date of expiration should be definitely fixed. The reason why this was not directed to be done by a proclamation of peace is made clear by the use of the word "thereafter." It was expected that the "conclusion of the war" would precede the termination of demobilization. Congress, therefore, provided that the time when the act ceased to be operative should be fixed by the President's ascertaining and proclaiming the date when demobilization had terminated.

It is insisted that he has done so. The contention does violence to both the language and the evident purpose of the provision. The "date of which shall be determined and proclaimed by the President" is a phrase so definite as to leave no room for construction. This requirement cannot be satisfied by passing references in messages to Congress, nor by newspaper interviews with high officers of the army or with officials of the War Department. When the President mentioned in his veto message the "demobilization of the army and navy" the words were doubtless used in a popular sense,

just as he had declared to Congress, on the occasion of the signing of the armistice: "The war thus comes to an end." If he had believed on October 28, 1919, that demobilization had, in an exact sense, terminated, he would doubtless have issued then a proclamation to that effect; for he had manifested a strong conviction that restriction upon the sale of liquor should end. Only by such proclamation could the purpose of Congress be attained; and the serious consequences attending uncertainty be obviated. But in fact demobilization had not terminated at the time of the veto of the Act of October 28, 1919; or at the time these suits were begun; and, for aught that appears, it has not yet terminated. The Report of the Secretary of War made to the President under date of November 11, 1919 (and transmitted to Congress on December 1), in describing the progress of demobilization, shows (p. 17) that during the preceding ten days (November 1–10) 2,018 officers and 10,266 enlisted men had been discharged; the rate of discharge being substantially the same as during the month of October—in which 8,690 officers and 33,000 enlisted men were discharged.

The War-Time Prohibition Act being thus valid and still in force, the decree in Number 589 is reversed and the case is remanded to the District Court with directions to dismiss the bill; and the decree in Number 602 is affirmed.

No. 589. *Reversed.*
No. 602. *Affirmed.*